

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(1) PRELIMINARY CONSIDERATIONS/1. The law of contract and scope of this title.

BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (

1. CREATION AND NATURE OF BUILDING CONTRACTS

(1) PRELIMINARY CONSIDERATIONS

1. The law of contract and scope of this title.

English law does not treat a building contract as a nominate contract. A building contract is a contract by which a person (commonly called a contractor) undertakes for consideration to carry out works of or for construction (or demolition) for another person (commonly called the employer or owner)¹. The term 'building contract' as used in this title describes not only contracts for or in connection with the construction of buildings (such as houses, extensions, offices and factories) but also contracts for major infrastructure, civil engineering works (such as roads, bridges and tunnels), dredging contracts, mechanical engineering and electrical engineering contracts and chemical engineering contracts. The term also includes contracts for complex projects such as power stations, ports, airports and underground systems. Building contracts have attributes of contracts for services and of contracts for the supply of goods and thus are contracts for work and materials². As such, building contracts have many similarities with shipbuilding contracts except that the product of a building contract will be either directly or indirectly attached to land and therefore will ultimately form part of the realty.

Part II of the Housing Grants, Construction and Regeneration Act 1996³ created a new type of contract called a 'construction contract'⁴. The terms 'building contract' and 'construction contract' are not synonymous. Whilst each 'construction contract' will also be a 'building contract', the opposite is not necessarily the case.

The law applicable to building contracts is the general law of contract⁵ (which is dealt with elsewhere in this work). This title does not reiterate the general principles of the law of contract applicable to building contracts. Furthermore much of the supposed law or principles relating to building contracts is on analysis found to be no more than the result of the interpretation of the relevant building contract and not a rule of law. This title is therefore confined to those matters which are or may be regarded as rules of law applicable to building contracts, but it must be emphasised that virtually all such rules may be displaced by the terms of the relevant contract.

For many construction contracts an employer may have retained an architect, engineer, surveyor or some other professional person to specify and also to supervise the work to be carried out by the contractor. The roles of such people are dealt with later in this title⁶.

1 In relation to the Locomotives Act 1898 s 12 (repealed) Buckley LJ defined the term 'building contract' as meaning 'a contract for the building of anything, not necessarily a house, but any other physical construction': *Carlisle RDC v Carlisle Corpn* [1909] 1 KB 471 at 483, CA. In *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717, [1973] 3 All ER 195 at 215, HL, Lord Diplock stated: 'a building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done'. However, note that the definition was relevant only to the facts of that case.

2 See SALE OF GOODS AND SUPPLY OF SERVICES.

3 See the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended): see paras 9-10, 155-159, 207 post.

4 See para 9 post.

5 See CONTRACT.

6 See para 220 et seq post.

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2. Standard forms.

In the United Kingdom there are numerous standard forms of contract for use on construction projects. Because of the proliferation of these standard forms and because they are frequently amended, this title does not provide references to standard forms of contract. However, it may be noted that for building works the Joint Contracts Tribunal (JCT)¹ issues a series of standard form contracts for use as principal or main contracts, nominated sub-contracts, ordinary or domestic sub-contracts, contracts of supply and contracts between an employer and sub-contractors or suppliers, as well as an intermediate form and a form for minor building works. For civil engineering projects the ICE conditions of contract² are commonly used or adapted for use by major employers. Standard form contracts produced by bodies fully representative of the interests of prospective parties are in principle unlikely to attract the contra proferentem rule³. The government generally uses its own sets of general conditions for works contracts, which encompass all aspects of building, civil engineering, mechanical and electrical engineering, as well as maintenance works⁴. They are revised from time to time and are used in conjunction with government standard forms for inviting and accepting tenders and for recording non-standard terms.

1 The Joint Contracts Tribunal is not a judicial or statutory body but a consultative group comprising the following (or representatives of the following): the Association of Consulting Engineers; the British Property Federation; the Construction Federation; the Local Government Association; the National Specialist Contractors Council; the Royal Institute of British Architects; the Royal Institution of Chartered Surveyors; and the Scottish Building Contracts Committee. The forms are available from the Royal Institute of British Architects. Copyright is vested in Joint Contracts Tribunal Limited.

2 The principal form of contract is produced by the Conditions of Contract Standing Joint Committee, which comprises the Institution of Civil Engineers, the Association of Consulting Engineers and the Civil Engineering Contractors Association (formerly the Federation of Civil Engineering Contractors). There is also a standard form for minor works. A standard form of sub-contract is also published by these bodies for civil engineering works.

The Institution of Mechanical Engineers and the Institution of Electrical Engineers publish various forms of contracts suitable for mechanical and electrical engineering works. The Institution of Chemical Engineers publishes a form of contract for use on chemical and process plant work which is widely used. Many major employers base their own forms of contract on the standard form appropriate to their industry.

3 See *Tersons Ltd v Stevenage Development Corp* [1963] 2 Lloyd's Rep 333 at 368, CA, per Pearson LJ. As to the contra proferentem rule see CONTRACT vol 9(1) (Reissue) para 776. However, an employer who deals as a consumer may still be able to rely on the Unfair Contract Terms Act 1977 (see *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115). As to the Unfair Contract Terms Act 1977 see CONTRACT vol 9(1) (Reissue) para 820 et seq. As to unfair terms in consumer arbitration agreements see the Arbitration Act 1996 ss 89-91 (s 91 as amended); and ARBITRATION vol 2 (2008) PARA 1215.

4 See the Government General Conditions for Works Contracts, known as the GC/Works suite of contracts. The conditions demonstrate that it is not necessary to have separate conditions for building and for civil engineering work. The GC/Works suite of contracts is published by the Stationery Office.

UPDATE

2 Standard forms

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/ (2) PARTIES AND TYPES OF CONTRACT/(i) Parties/3. Architects and engineers.

(2) PARTIES AND TYPES OF CONTRACT

(i) Parties

3. Architects and engineers.

In large contracts, the employer will usually¹ require the services of a professionally qualified person to design² the work, to prepare the contract documents and to ensure compliance with the requirements of planning³ and building regulations⁴. Usually the person chosen to design a building or building works will be a professionally qualified architect (or a firm or company of architects) and the person engaged to design civil engineering works will be a chartered or other qualified engineer and a member of an institution such as the Institution of Civil Engineers, the Institution of Structural Engineers, the Institution of Mechanical Engineers or the Institution of Electrical Engineers⁵ or a firm or company with such engineers.

The architect or engineer may also be required to inspect or supervise the construction of the works periodically. It is common for the building or engineering contract to give the architect or engineer express authority to act as the employer's agent⁶. Further, contracts for works of construction commonly give the architect or the engineer certain functions such as to determine disputes which may arise in the course of the contract, to issue certificates, to express opinions, or to make determinations, for example stating the amount due to the contractor. In the discharge of these functions, the architect or engineer acts as the agent of the employer and must act fairly⁷; he owes a duty to the employer but not necessarily to the contractor in so doing⁸. Although an architect or engineer may be given considerable powers by the building contract and may be required to carry out important functions under it he is not a party to it. Any duties that the architect may owe to the employer will derive from the architect's appointment by the employer. Any duties that the architect may owe to the contractor will derive from particular circumstances⁹ and not from the fact of appointment under the contract¹⁰. Where more than one consultant is engaged the contract should make clear their respective authorities and functions¹¹.

1 Where the contractor has produced the design of the works, the contract between him and the employer is sometimes called a 'package-deal' or 'design and build' or 'turnkey' contract: see para 8 post.

2 Generally design connotes what the contractor is required to complete, not how he is to do it; this will depend, however, on the contract documents in any particular case: see *Thorn v London Corp* (1876) 1 App Cas 120, HL (where the method of realising the design was set out in the contract documents). As to contract documents see para 11 post.

3 See para 104 post; and TOWN AND COUNTRY PLANNING.

4 See BUILDING.

5 There is a large number of professional bodies; as to the qualifications and professional conduct of architects and engineers in general see para 220 et seq post. As to the nature of the Institution of Civil Engineers see *Institution of Civil Engineers v IRC* [1932] 1 KB 149, CA. As to the Institution of Civil Engineers see para 220 post.

6 As to the rights and duties arising between the architect or engineer and the employer see para 253 et seq post. As to the relationship between agent and principal see generally AGENCY vol 1 (2008) PARA 71 et seq.

7 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA.

8 *Hosier & Dickinson Ltd v P & M Kaye Ltd* [1971] 1 All ER 301 at 305, [1970] 1 WLR 1611 at 1616, CA, per Lord Denning MR (affd sub nom *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146, HL); *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA.

9 See eg *Townsend's (Builders) Ltd v Cinema News and Property Management Ltd (David A Wilkie & Partners, third party)* [1959] 1 All ER 7, [1959] 1 WLR 119, 20 BLR 118, CA. See also para 266 post.

10 *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA.

11 Eg that all instructions are issued by the architect or lead consultant and not directly to a contractor or sub-contractor by a specialist consultant.

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4. Surveyors and quantity surveyors.

There are many aspects to surveying, such as estate management, building surveying, quantity surveying, land surveying and town and country planning¹. A surveyor is often employed to survey a building on behalf of a prospective purchaser. Building surveyors are commonly engaged to design and supervise work and as such are to be equated to architects and engineers. The branch of the profession most closely concerned with the letting and execution of contracts for major works of construction is that of quantity surveyor². The quantity surveyor is normally engaged by the employer and his duties derive from the terms of his appointment. It is not, however, uncommon for the architect to engage a quantity surveyor with the express or implied authority of the employer. The complexity of major construction works is such that it is now considered necessary to calculate the amount of excavation, sub-structure and super-structure work and all other work and operations required to complete them in order to enable a contractor to submit a tender. Where such calculation is commissioned in order to obtain tenders it is a function of the quantity surveyor to make and set out the results of the calculations derived from the architect's drawings and specifications³. The quantity surveyor will now generally be required to value the work executed during the progress of the contract and to advise the architect or engineer on the amount of interim or final certificates⁴. Where the contractor has a claim for payment under the provisions of a contract, the quantity surveyor may be required to ascertain the sum due, but he is not normally given the power to determine whether or not a sum so ascertained is due to the contractor⁵. A valuation by a quantity surveyor will not fetter the jurisdiction of a certifier. The growth of the tasks of a quantity surveyor has led to the use of the description 'construction cost consultant'. Sizeable contractors will employ quantity surveyors to safeguard their interests during the performance of a building contract, hence the description 'contractor's quantity surveyor'.

1 As to surveyors generally see para 283 et seq post.

2 The term 'quantity surveyor' has been judicially construed as meaning a person 'whose business consists in taking out in detail the measurements and quantities, from plans prepared by an architect, for the purpose of enabling the builders to calculate the amounts for which they would execute the plans': *Taylor v Hall* (1870) IR 4 CL 467 at 476 per Morris J. Today a quantity surveyor may be as much concerned with post-contract as with pre-contract services. As to the rights and duties of the quantity surveyor see para 311 et seq post.

3 The quantity surveyor may also be responsible for compiling the specification. The description of specialist work such as mechanical and electrical work or heating and ventilation services may be carried out by the relevant consultant engineer's representatives.

4 It is for the architect to determine whether work has been properly executed and not the quantity surveyor: see *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149 at 165-166 per Judge Stabb QC.

5 Even where he is empowered to agree amounts with the contractor he will not have authority to waive requirements as to liability: *John Laing Construction Ltd v County and District Properties Ltd* (1982) 23 BLR 1. See also *Rosehaugh Stanhope Properties (Broadgate Phase 6) plc and Rosehaugh Stanhope (Phase 7) plc v Redpath Dorman Long Ltd* (1990) 50 BLR 69 (construction manager's authority).

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5. Supervising and superintending officers and project managers.

The term 'supervising officer' describes a person who is not entitled to be called an architect¹, but is enabled to discharge the functions given to an architect under standard forms of contract. 'Superintending officer' is the term used by the government in its contracts. It is frequently abbreviated to 'SO' and refers to the government's supervisor of the construction works. Project managers are a relatively recent creation. When they are appointed by employers they usually take over a co-ordinating or organisational role formerly exercised by the architect, but the ambit of their responsibilities and the nature of their relationship with the other professionals engaged will depend upon the terms of their appointment². They should be distinguished from project managers employed by contractors to manage building contracts formerly and traditionally known as 'agents' or 'foremen'.

1 As to restrictions on use of title of 'architect' see para 223 post. As to the unlawful use of title of 'architect' see para 225 post.

2 Where a project manager who, under the terms of engagement, owes a duty of ensuring that any required insurance is in place, but does not have the expertise to advise his employer as to the adequacy of the proposed insurance arrangements, he ought either to obtain independent expert advice or inform the employer that independent expert advice is required: *Pozzolanic Lytag Ltd v Bryan Hobson Associates* [1999] BLR 267, (1998) 15 Const LJ 135.

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6. The resident engineer and the clerk of works.

The person named in the contract as the engineer or the architect may not be required by the employer to give constant attention to the day-to-day supervision of the works¹. A resident engineer or clerk of works may be appointed for this purpose and may also be authorised by the employer to exercise delegated powers of the engineer or architect². On engineering contracts the resident engineer may be appointed from the staff of the consulting engineer or may be appointed and paid by the employer and in this event the resident engineer, even though working under the control of the engineer, will be the servant of the employer³. On building contracts, the clerk of works is employed to observe the progress of the work on behalf of the employer. While the clerk of works will assist the architect in the supervision of the work, the architect cannot generally delegate his responsibility for important matters to the clerk of works⁴.

1 As to the degree of supervision ordinarily expected of an architect see *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406 at 443, [1965] 3 All ER 619 at 636, HL, per Lord Upjohn; *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149 at 162, 165 per Judge Stabb QC; *Gray (Special Trustees of the London Hospital) v TP Bennett & Son* (1987) 43 BLR 63 at 82 per Sir William Stabb QC; *Alexander Corfield v David Grant (Construction) Ltd* (1976) 4 BLR 103 at 123 per Judge Stabb QC; *Kensington and Westminster Health Authority v Wettern Composites* (1984) 31 BLR 57 at 82 per Judge Smout QC; *Department of National Heritage v Steensen Varming Mulcahy* (1998) 60 ConLR 33 at 98-99 per Judge Bowsher QC.

2 See eg *Ministry of Defence v Scott Wilson Kirkpatrick* [2000] BLR 20, CA. But see *A-G v Briggs* (1855) 1 Jur NS 1084 (where it was held that the resident engineer's approval of plans required to be approved by the principal engineer was unauthorised). Cf *Re De Morgan Snell & Co and Rio de Janeiro Flour Mills and Granaries Ltd* (1892) 8 TLR 292, CA (where the resident engineer was held to be in a position analogous to that of the engineer).

3 *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349, [1965] 1 WLR 576, DC.

4 *Saunders and Collard v Broadstairs Local Board* (1890) 2 Hudson's BC (4th Edn) 164, DC; *Lee v Bateman* (1893) Times, 31 October; *Leicester Guardians v Trollope* (1911) 75 JP 197. On complex work more than one resident engineer or clerk of works may be employed, eg where specialist work requires specialist inspection or supervision.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/ (2) PARTIES AND TYPES OF CONTRACT/(i) Parties/7. Sub-contractors and suppliers.

7. Sub-contractors and suppliers.

A sub-contractor is one who agrees with the contractor to carry out part of the works of construction or works required for it (such as where services are provided). A supplier is also a sub-contractor to the contractor, but the term commonly refers to one who supplies to the contractor but does not erect or install, goods or materials (such as prefabricated parts) necessary for the completion of the works¹. In the interest of retaining control over the cost and quality of the works, the employer often requires the contractor to employ particular sub-contractors or suppliers, or that the person selected by the contractor be approved by the employer². The employer may have powers under the main contract to direct that the contractor enter into a sub-contract or contract of supply on terms agreed between the employer and the sub-contractor. In the latter circumstances the sub-contractor or supplier is sometimes called a 'nominated' sub-contractor or supplier³ or a 'named' sub-contractor⁴. A labour only sub-contractor is one who supplies workmen to the contractor to work under the contractor's direction; a labour only sub-contractor does not undertake responsibility for any particular part of the works⁵.

In certain circumstances, the contractor may be under a statutory duty⁶ to deduct from payments due to a sub-contractor. The sum so deducted must be remitted by the contractor to the Commissioners of Inland Revenue as tax payable by the sub-contractor⁷.

1 The term 'builders' merchant' is commonly used to denote the supplier.

2 See *Leedsford Ltd v Bradford City Council* (1956) 24 BLR 45, CA.

3 See paras 40-41 post.

4 Under the JCT intermediate form of building contract, nominated sub-contractors are replaced by named sub-contractors, being sub-contractors who are specifically identified in the contract documents and with whom the contractor is required to sub-contract upon a standard form of named contract. As to JCT standard forms of contract see para 2 ante.

5 See para 53 post.

6 See the Income and Corporation Taxes Act 1988 s 559 (as amended); para 54 post; and INCOME TAXATION vol 23(1) (Reissue) para 809 et seq. As to the special tax provisions which apply to sub-contractors in the construction industry see the Income and Corporation Taxes Act 1988 Pt XIII Ch IV (ss 559-567) (as amended); the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993, SI 1993/743 (as amended); para 54 post; and INCOME TAXATION vol 23(1) (Reissue) para 809 et seq.

7 See the Income and Corporation Taxes Act 1988 s 559 (as amended); para 54 post; and INCOME TAXATION vol 23(1) (Reissue) para 809 et seq.

UPDATE

7 Sub-contractors and suppliers

TEXT AND NOTES 6, 7--These provisions are replaced by the construction industry scheme established by the Finance Act 2004 Pt 3 Ch 3 (ss 57-77). SI 1993/743 replaced by Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005/2045 (see INCOME TAXATION vol 23(1) (Reissue) PARA 809-834).

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(ii) Types of Contract

8. Types of contract.

It is sometimes convenient to label building contracts either by reference to the manner by which the contractor's remuneration is arrived at or by reference to the nature of the contractor's obligations. Many modern contracts are hybrid and only the simplest warrant such descriptions, and then only because the contract does not itself provide for the consequences.

A 'lump sum' contract is one under which the contractor will receive on completion of the whole works payment of a single sum. If the contractor fails to complete the works he will not have earned the payment due¹. An employer cannot, however, refuse to pay the lump sum because the work is incomplete by reason only of minor defects. He is liable to pay the full price but subject to an abatement on account of the defects. What constitutes minor defects depends on the facts².

An 'entire' contract is one where complete performance by a party is a condition precedent to the liability of the other party³. Whether a contract is an entire one is a matter of construction⁴. A lump sum contract is not necessarily an entire contract⁵. A contract for payment by instalments is not an entire contract but the principles applicable to entire contracts may also apply to contractor's rights to an instalment, for example the contractor's right to be paid retention money⁶. Clear words are required to bring an entire contract into existence⁷.

A 'measure and value' contract is one in which the amount payable to the contractor is on completion determined by measuring the work done and valuing it in accordance with the contract rates and prices set out in a bill of quantities or schedule of rates⁸. This type of contract is used where the general nature of the work to be executed is clear but its extent is not.

A 'cost plus' contract is one in which the contractor is to be paid the costs actually expended plus an amount (fixed or calculated as a percentage on the cost) for profit and such costs as are not vouched for. These contracts are sometimes also called 'prime cost' or 'fixed fee' contracts. They are akin also to contracts in which the contractor is paid on a 'time and materials' basis or 'for dayworks'.

A 'term' contract is one under which the contractor undertakes for a term (for example, a year) to carry out such work as may be required of him by the employer. Payment will generally be made by the application of an agreed schedule of rates for the work called for. Examples would be an annual contract for the maintenance of roads within part of a county⁹ or contracts in relation to local authority owned housing.

The trend in the United Kingdom has been for most of the work on large building projects to be sub-contracted by the contractor so that the only personnel directly employed are the management and supervisory staff. Such arrangements have been formalised with the now fairly common use of a 'management contract' under which the contractor undertakes only to manage the project and employs as sub-contractors designated persons in respect of whom his liability may be limited. The management contractor is normally paid the prime cost of the works plus a fee¹⁰.

'Design and build' or 'turnkey' contracts (colloquially, 'package deal' contracts) are contracts under which the contractor undertakes to design the whole or part of the works in accordance

with the employer's requirements, to carry out such works and to hand them over completed to meet such requirements¹¹.

Part II of the Housing Grants, Construction and Regeneration Act 1996¹² created a type of contract called a 'construction contract', and introduced certain statutory rights and entitlements for parties to such contracts in relation to payment and adjudication¹³.

1 *Cutter v Powell* (1795) 6 Term Rep 320; *Munro v Butt* (1858) 8 E & B 738.

2 See para 64 post.

3 See *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80 at 122 per Judge Newey QC, citing *Hoening v Isaacs* [1952] 2 All ER 176 at 180-181, CA, per Denning LJ.

4 See *Tern Construction Group v RBS Garages Ltd* (1992) 34 ConLR 137 (where the JCT standard form of contract was held not to be an entire contract). As to JCT standard forms of contract see para 2 ante.

5 *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80.

6 *Hoening v Isaacs* [1952] 2 All ER 176 at 180-181, CA, per Denning LJ. As to retention money see para 149 post.

7 *Appleby v Myers* (1867) LR 2 CP 651.

8 In *Farr Ltd v Ministry of Transport* (1965) 5 BLR 94 the ICE conditions of contract were treated as a measure and value form of contract. As to ICE conditions of contract see para 2 ante. See eg *Arcos Industries Pty Ltd v Electricity Commission of New South Wales* (1973) 12 BLR 65, NSW CA (where a schedule of rates contract was used).

9 See also *Kelly Pipelines Ltd v British Gas plc* (1989) 48 BLR 126.

10 The JCT publishes a standard form of management contract, with related standard works contract conditions.

11 'Turnkey contract' was defined in *High Mark (M) Sdn Bhd Ltd v Patco Malaysian Sdn Bhd* (1984) 28 BLR 129, Malaysian HC, although in *Cable (1956) Ltd v Hutcherson Ltd* (1969) 43 ALJR 321 at 324, Aust HC, it was held not to be a term of art. For an example in which this type of contract was considered see *Viking Grain Storage Ltd v TH White Installations Ltd* (1985) 33 BLR 103. The JCT publishes a modified version of its standard main form intended for use where the contractor's design is used.

12 In the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended): see paras 9-10, 155-159, 207 post.

13 For the meaning of 'construction contract' see para 9 post. As to the rights in relation to payment see paras 154-160 post. As to the right to refer disputes to adjudication see the Housing Grants, Construction and Regeneration Act 1996 s 108; and para 206 et seq post.

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9. Meaning of 'construction contract' and 'construction operations'.

Part II of the Housing Grants, Construction and Regeneration Act 1996¹ created a new type of contract called a 'construction contract' and introduced statutory rights and entitlements for parties to such contracts. The statutory provisions have two primary purposes. First, to provide that every construction contract must include a mechanism for determining what payments become due, and when and the circumstances in which payment may be withheld². Secondly, to provide a right to a party to a construction contract to refer any disputes arising under the contract for adjudication³. The Secretary of State⁴ has power by regulations to make a scheme for construction contracts, which contains provisions about the matters referred to in Part II of the Act⁵. Where a construction contract does not comply with the requirements of certain provisions of Part II⁶, the relevant provisions of the scheme have effect. Where any provisions of the scheme so apply in default of contractual provision agreed⁷ by the parties, they have effect as implied terms of the contract concerned⁸.

'Construction contract' means an agreement with a person for any of the following⁹: (1) the carrying out of construction operations¹⁰; (2) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise¹¹; (3) providing his own labour, or the labour of others, for the carrying out of construction operations¹². A construction contract includes an agreement to do architectural, design, or surveying work, or to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations¹³, but does not include a contract of employment¹⁴.

'Construction operations' means, subject to the exceptions stated below, operations of any of the following descriptions¹⁵:

- 1 (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not)¹⁶;
- 2 (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence¹⁷;
- 3 (c) installation in any building or structure of fittings forming part of the land, including systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems¹⁸;
- 4 (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration¹⁹;
- 5 (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are described in heads (a) to (d) above, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works²⁰;

- 6 (f) painting or decorating the internal or external surfaces of any building or structure²¹.

The following operations are not construction operations²²:

- 7 (i) drilling for, or extraction of, oil or natural gas²³;
 8 (ii) extraction (whether by underground or surface working) of minerals;
 tunnelling or boring, or construction of underground works, for this purpose²⁴;
 9 (iii) assembly, installation or demolition of plant or machinery, or erection or
 demolition of steelwork for the purposes of supporting or providing access to plant
 or machinery, on a site where the primary activity is²⁵: (A) nuclear processing,
 power generation, or water or effluent treatment²⁶; or (B) the production,
 transmission, processing or bulk storage (other than warehousing) of chemicals,
 pharmaceuticals, oil, gas, steel or food and drink²⁷;
 10 (iv) manufacture or delivery to site of:
 1
 1. (A) building or engineering components or equipment²⁸;
 2. (B) materials, plant or machinery²⁹; or
 3. (C) components for systems of heating, lighting, air-conditioning, ventilation,
 power supply, drainage, sanitation, water supply or fire protection, or for security or
 communications systems³⁰,
 4. except under a contract which also provides for their installation³¹;
 2
 11 (v) the making, installation and repair of artistic works, being sculptures, murals
 and other works which are wholly artistic in nature³².

1 le the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended). As to the application of Pt II (as amended) see para 10 post.

2 See paras 154-160 post.

3 See para 206 et seq post.

4 In any enactment 'Secretary of State' means one of Her Majesty's Principal Secretaries of State: Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them. As to the office of Secretary of State generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 355.

Many statutory functions previously vested in Ministers of the Crown are now exercisable in relation to Wales by the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended). Functions transferred to the National Assembly for Wales include certain functions under the Defective Premises Act 1972 (see paras 77-79 post), the Local Government Act 1988 (see para 27 post), and the Housing Grants, Construction and Regeneration Act 1996 (see paras 154-160, 206 et seq post): see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1 (as amended). As to the establishment, constitution and functions of the National Assembly for Wales see the Government of Wales Act 1998; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to Ministers of the Crown see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 354 et seq.

5 See the Housing Grants, Construction and Regeneration Act 1996 s 114(1), (3) (s 114(3) amended by virtue of the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2(1), Schedule). Before making any such regulations the Secretary of State must consult such persons as he thinks fit: Housing Grants, Construction and Regeneration Act 1996 s 114(2), (3) (s 114(3) as so amended). Such regulations must not be made unless a draft of them has been approved by resolution of each House of Parliament: s 114(5). As to the regulations made under s 114 (as amended) in relation to England and Wales see the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649; and paras 160, 208-213 post.

Orders, regulations and directions under the Housing Grants, Construction and Regeneration Act 1996 may make different provision for different cases or descriptions of case, including different provision for different areas (s 146(1)), and may contain such incidental, supplementary or transitional provisions and savings as the Secretary of State considers appropriate (s 146(2)). Orders and regulations under that Act must be made by

statutory instrument which, except for orders and regulations subject to affirmative resolution procedure (see s 104(4) (see note 9 infra), s 105(4) (see note 15 infra), s 106(4) (see para 10 post) and s 114(5)); orders under s 150(3); or regulations which only prescribe forms or particulars to be contained in forms, are subject to annulment in pursuance of a resolution of either House of Parliament: s 146(3).

6 le *ibid* s 108 (see para 207 post), s 109 (see para 155 post), s 110 (see para 156 post), s 111 (see para 157 post) and s 113 (see para 159 post).

7 Agreements are effective for the purposes of *ibid* Pt II (as amended) only if in writing: see para 10 ante.

8 *Ibid* s 114(4).

9 *Ibid* s 104(1). The Secretary of State may by order add to, amend or repeal any of the provisions of s 104(1), (2), (3) as to the agreements which are construction contracts for the purposes of Pt II (as amended) or are to be taken or not to be taken as included in references to such contracts: s 104(4). No such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 104(4). At the date at which this volume states the law no such orders had been made. See note 5 supra.

10 *Ibid* s 104(1)(a).

11 *Ibid* s 104(1)(b). As to sub-contracting see para 40 et seq post.

12 *Ibid* s 104(1)(c).

13 *Ibid* s 104(2). See note 9 supra.

14 *Ibid* s 104(3). See note 9 supra. The reference to a contract of employment in the text is a reference to a contract of employment within the meaning of the Employment Rights Act 1996 (see EMPLOYMENT vol 39 (2009) PARA 2): Housing Grants, Construction and Regeneration Act 1996 s 104(3).

15 *Ibid* s 105(1). The Secretary of State may by order add to, amend or repeal any of the provisions of s 105(1) or (2) as to the operations and work to be treated as construction operations for the purposes of Pt II (as amended): s 105(3). No such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 105(4). At the date at which this volume states the law no such orders had been made. See note 5 supra.

As to the meaning of 'construction operations' see also *Palmer's Ltd v ABB Power Construction Ltd* [1999] BLR 426 (scaffolding may be 'construction operations' even though, since it was scaffolding provided in connection with the assembly of a boiler, it fell within the exclusion under the Housing Grants, Construction and Regeneration Act 1996 s 105(2)(c)(i) (see head (iii)(A) in the text)); *Nottingham Community Housing Association Ltd v Powerminster Ltd* (2000) 75 ConLR 65 (maintenance and repair of domestic gas appliances are 'construction operations'); *ABB Zantingh Ltd v Zedal Building Services Ltd* (2000) 77 ConLR 32 (construction of generators may be 'construction operations' even though power generation is excluded under the Housing Grants, Construction and Regeneration Act 1996 s 105(2)(c)(i)); *Mitsui Babcock Energy Services v Foster Wheeler Energia OY* 2001 SLT 1158, Ct of Sess (construction of boilers for operation by separate enterprise supplying steam to petrochemical company was not construction operation by virtue of exclusion under the Housing Grants, Construction and Regeneration Act 1996 s 105(2)(c)(ii) (see head (iii)(B) in the text)); *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] BLR 407 (installation of shop fittings was not 'construction operations'); *Homer Burgess Ltd v Chirax (Annan) Ltd* [2000] BLR 124, Ct of Sess (installation of pipework fell within the scope of the Housing Grants, Construction and Regeneration Act 1996 s 105(2)(c)(ii) and was not a construction operation).

16 Housing Grants, Construction and Regeneration Act 1996 s 105(1)(a).

17 *Ibid* s 105(1)(b).

18 *Ibid* s 105(1)(c).

19 *Ibid* s 105(1)(d).

20 *Ibid* s 105(1)(e).

21 *Ibid* s 105(1)(f).

22 *Ibid* s 105(2). See note 15 supra.

23 *Ibid* s 105(2)(a).

24 *Ibid* s 105(2)(b).

25 Ibid s 105(2)(c).

26 Ibid s 105(2)(c)(i). See, however, *Palmer's Ltd v ABB Power Construction Ltd* [1999] BLR 426; *ABB Zantingh Ltd v Zedal Building Services Ltd* (2000) 77 ConLR 32; and note 15 supra.

27 Housing Grants, Construction and Regeneration Act 1996 s 105(2)(c)(ii). See *Homer Burgess Ltd v Chirax (Annan) Ltd* [2000] BLR 124, Ct of Sess; *Mitsui Babcock Energy Services v Foster Wheeler Energia OY* 2001 SLT 1158, Ct of Sess; and note 15 supra.

28 Housing Grants, Construction and Regeneration Act 1996 s 105(d)(i).

29 Ibid s 105(d)(ii).

30 Ibid s 105(d)(iii).

31 Ibid s 105(2)(d).

32 Ibid s 105(2)(e).

UPDATE

9-10 Meaning of 'construction contract' and 'construction operations', Application of Part II of the Housing Grants, Construction and Regeneration Act 1996

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

9 Meaning of 'construction contract' and 'construction operations'

NOTE 4--As to the National Assembly for Wales and the Welsh Assembly Government, see Government of Wales Act 2006; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

TEXT AND NOTE 17--Housing Grants, Construction and Regeneration Act 1996 s 105(1)(b) amended: Communications Act 2003 Sch 17 para 137.

NOTE 26--See also *North Midland Construction plc v AE & E Lentjes UK Ltd* [2009] EWHC 1371 (TCC), (2009) 126 ConLR 213.

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10. Application of Part II of the Housing Grants, Construction and Regeneration Act 1996.

The provisions of Part II of the Housing Grants, Construction and Regeneration Act 1996¹ apply only where the construction contract² is in writing, and any other agreement between the parties as to any matter is effective for these purposes only if in writing³. Where an agreement relates to construction operations and other matters, Part II of the Act applies to it only so far as it relates to construction operations⁴. It applies only to construction contracts which are entered into after 1 May 1998⁵, and relate to the carrying out of construction operations in England, Wales or Scotland⁶. Part II applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract⁷.

Part II of the Act does not apply to a construction contract with a residential occupier⁸, or to any other description of construction contract excluded from the operation of that Part by order of the Secretary of State⁹. The contracts which have been excluded are:

- 12 (1) agreements made under specified statutory provisions dealing with highway works¹⁰, planning obligations¹¹, sewage works¹² and externally financed NHS trust agreements¹³;
- 13 (2) agreements entered into by specified public bodies under the private finance initiative (or a project applying similar principles)¹⁴;
- 14 (3) agreements which primarily relate to the financing of works¹⁵; and
- 15 (4) development agreements, which contain provision for the disposal of an interest in land¹⁶.

Part II applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity¹⁷, and applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest¹⁸. Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty is represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of Part II, by the Chancellor of the Duchy or such person as he may appoint¹⁹. Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy is represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of Part II, by such person as he may appoint²⁰.

1 Ie the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended).

2 Ie a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

3 Ibid s 107(1). The expressions 'agreement', 'agree' and 'agreed' are to be construed accordingly: s 107(1). There is an agreement in writing if: (1) the agreement is made in writing (whether or not it is signed by the parties); (2) the agreement is made by exchange of communications in writing; or (3) the agreement is evidenced in writing: s 107(2). Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing: s 107(3). An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement: s 107(4). An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one

party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged: s 107(5). References in Pt II (as amended) to anything being written or in writing include its being recorded by any means: s 107(6). See *Grovedeck Ltd v Capital Demolition Ltd* [2000] BLR 181 (where it was held that, under an oral contract; there was no jurisdiction for adjudicator under the Housing Grants, Construction and Regeneration Act 1996); *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] BLR 217, CA (where it was held that the whole agreement, not just part of it, had to be evidenced in writing).

4 Housing Grants, Construction and Regeneration Act 1996 s 104(5). An agreement relates to construction operations so far as it makes provision of any kind within s 104(1) or s 104(2) (see para 9 ante): s 104(5). For the meaning of 'construction operations' see para 9 ante.

5 The commencement date of *ibid* Pt II for these purposes: see the Housing Grants, Construction and Regeneration Act 1996 (England and Wales) (Commencement No 4) Order 1998, SI 1998/650. The Housing Grants, Construction and Regeneration Act 1996 ss 104, 105, 106, 108, 114, so far as conferring on the Secretary of State or the Lord Advocate a power to consult, to make orders, regulations or determinations, to give directions, guidance, approvals or consents, to specify matters, or to impose conditions, were brought into force on 11 September 1996 by the Housing Grants, Construction and Regeneration Act 1996 (Commencement No 1) Order 1996, SI 1996/2352. As to the Secretary of State see para 9 note 4 ante. As to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the National Assembly for Wales see para 9 note 4 ante.

6 Housing Grants, Construction and Regeneration Act 1996 s 104(6). 'England' means, subject to any alteration of boundaries under the Local Government Act 1972 Pt IV (ss 53-78) (as amended), the area consisting of the counties established by s 1 (see LOCAL GOVERNMENT vol 69 (2009) PARAS 5, 24, 27), Greater London and the Isles of Scilly: Interpretation Act 1978 s 5, Sch 1. 'Wales' means the combined area of the counties which were created by the Local Government Act 1972 s 20 (as substituted) (see LOCAL GOVERNMENT vol 69 (2009) PARAS 5, 37, 41), but subject to any alteration made under s 73 (as amended) (consequential alteration of boundary following alteration of watercourse) (see LOCAL GOVERNMENT vol 69 (2009) PARA 90): Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 s 1(3), Sch 2 para 9). As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) para 29.

7 Housing Grants, Construction and Regeneration Act 1996 s 104(7).

8 A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence: *ibid* s 106(2). For these purposes, 'dwelling' means a dwelling-house or a flat; 'dwelling-house' does not include a building containing a flat; and 'flat' means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally: s 106(2). The Secretary of State may by order amend s 106(2): s 106(3). No order under s 106 may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 106(4). At the date at which this volume states the law no such order had been made. As to the making of orders under s 106(4) see para 9 note 5 ante.

9 *Ibid* s 106(1). No order under s 106 may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 106(4). In exercise of the power conferred by s 106(1) the Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, has been made: see the text and notes 10-16 infra.

10 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is an agreement under the Highways Act 1980 s 38 (as amended) (power of highway authorities to adopt by agreement) (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 253) or s 278 (agreements as to execution of works) (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 73): Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 3(a).

11 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is an agreement under the Town and Country Planning Act 1990 s 106 (as substituted) (planning obligations) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) paras 244-245), s 106A (as added) (modification or discharge of planning obligations) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) paras 246-249) or s 299A (as added) (Crown planning obligations) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) para 251): Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 3(b).

12 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is an agreement under the Water Industry Act 1991 s 104 (agreements to adopt sewer, drain or sewage disposal works) (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 1006): Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 3(c).

13 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is an externally financed development agreement within the meaning of the National Health Service (Private Finance) Act 1997 s 1 (powers of NHS trusts to enter into agreements): Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 3(d).

14 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is a contract entered into under the private finance initiative: Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 4(1). A contract is entered into under the private finance initiative if all the following conditions are fulfilled:

- 1 (1) it contains a statement that it is entered into under that initiative or, as the case may be, under a project applying similar principles (art 4(2)(a));
- 2 (2) the consideration due under the contract is determined at least in part by reference to one or more of the following:
 1. (a) the standards attained in the performance of a service, the provision of which is the principal purpose or one of the principal purposes for which the building or structure is constructed (art 4(2)(b)(i));
1
 2. (b) the extent, rate or intensity of use of all or any part of the building or structure in question (art 4(2)(b)(ii)); or
2
 3. (c) the right to operate any facility in connection with the building or structure in question (art 4(2)(b)(iii)); and
3
- 3 (3) one of the parties to the contract is:
 4. (a) a Minister of the Crown (art 4(2)(c)(i));
4
 5. (b) a department in respect of which appropriation accounts are required to be prepared under the Exchequer and Audit Departments Act 1866 (Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 4(2)(c)(ii));
5
 6. (c) any other authority or body whose accounts are required to be examined and certified by or are open to the inspection of the Comptroller and Auditor General by virtue of an agreement entered into before the commencement date or by virtue of any enactment (art 4(2)(c)(iii));
6
 7. (d) any authority or body listed in the National Audit Act 1983 s 7(4), Sch 4 (as amended) (nationalised industries and other public authorities) (Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 4(2)(c)(iv));
7
 8. (e) a body whose accounts are subject to audit by auditors appointed by the Audit Commission (art 4(2)(c)(v));
8
 9. (f) the governing body or trustees of a voluntary school within the meaning of the Education Act 1996 s 31 (repealed) (county schools and voluntary schools) (Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 4(2)(c)(vi)); or
9
 10. (g) a company wholly owned by any of the bodies described in heads (i)-(v) supra (art 4(2)(c)(vii)).
10

As to appropriation accounts see now the Government Resources and Accounts Act 2000; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 724-726. As to the Audit Commission see LOCAL GOVERNMENT vol 69 (2009) PARA 744 et seq.

15 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is a finance agreement: (Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 5(1)). A contract is a finance agreement if it is any one of the following:

- 4 (1) any contract of insurance (art 5(2)(a));

- 5 (2) any contract under which the principal obligations include the formation or dissolution of a company, unincorporated association or partnership (art 5(2)(b));
- 6 (3) any contract under which the principal obligations include the creation or transfer of securities or any right or interest in securities (art 5(2)(c));
- 7 (4) any contract under which the principal obligations include the lending of money (art 5(2)(d));
- 8 (5) any contract under which the principal obligations include an undertaking by a person to be responsible as surety for the debt or default of another person, including a fidelity bond, advance payment bond, retention bond or performance bond (art 5(2)(e)).

16 A construction contract is excluded from the operation of the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended) if it is a development agreement: Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648, art 6(1). A contract is a development agreement if it includes provision for the grant or disposal of a relevant interest in the land on which take place the principal construction operations to which the contract relates: art 6(2). For these purposes, a relevant interest in land means a freehold or a leasehold for a period which is to expire no earlier than 12 months after the completion of the construction operations under the contract: art 6(3).

17 Housing Grants, Construction and Regeneration Act 1996 s 117(1).

18 Ibid s 117(2).

19 Ibid s 117(3).

20 Ibid s 117(4).

UPDATE

9-10 Meaning of 'construction contract' and 'construction operations', Application of Part II of the Housing Grants, Construction and Regeneration Act 1996

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

10 Application of Part II of the Housing Grants, Construction and Regeneration Act 1996

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--*RJT Consulting Engineers*, cited, reported at [2002] EWCA Civ 270, [2002] 1 WLR 2344. A written contract which makes reference to a specified amount of work to be undertaken in a specified time and under which substantial extra work is done is one to which s 107 applies: *Total M and E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248 (QB), (2002) 87 ConLR 154. See also *Thomas-Fredric's (Construction) Ltd v Keith Wilson* [2004] BLR 23, CA; and *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC), [2008] BLR 24; and *Aceramais Holdings Ltd v Hadleigh Partnerships Ltd* [2009] EWHC 1664 (TCC), [2009] All ER (D) 179 (Jul).

NOTE 14--Now, in relation to Wales, head 3(e) or appointed by the Auditor General for Wales: SI 1998/648 art 4(2)(c)(v) (amended by SI 2005/757).

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11. Contract documents generally.

A building contract may comprise the following documents¹:

- 16 (1) The agreement itself².
- 17 (2) The conditions³.
- 18 (3) The drawings⁴.
- 19 (4) The specification⁵.
- 20 (5) A bill or bills of quantities⁶.
- 21 (6) Schedules of rates or prices for the valuation of the works⁷.
- 22 (7) A programme or method statement⁸ for the order or manner in which the works may or will be carried out⁹.

If the building contract does not itself prescribe a method for reconciling conflicting provisions of the various contract documents then the provisions drawn up for or most relevant to the project may be preferred¹⁰.

1 Standard forms will usually define the documents which form part of the contract. A document may be incorporated by reference provided that there is evidence of the parties' intention to incorporate: *Moore v Shawcross* [1954] JPL 431, [1954] CLY 342. See also *Aqua Design and Play International Ltd (t/a Aqua Design) v Kier Regional Ltd (t/a French Kier Anglia)* [2002] EWCA Civ 797, [2002] All ER (D) 192 (May). As to standard forms for building contracts see para 2 ante.

2 This may also be constituted by the contractor's tender, quotation or estimate (frequently in the form sent out with the invitation to tender) and some letter or other document of acceptance.

3 Sometimes there are two or more sets of conditions, for example general and special or particulars or supplementary.

4 These will have been prepared by or for the employer (sometimes by the tenderer or contractor) and will generally have been used to prepare the tender. The architect may issue 'working' drawings after the contract is concluded. As to the position where such drawings contain details outside the contemplation of the contract see para 74 post.

5 This is prepared similarly to the drawings (see note 4 supra) and frequently split into elements or sections referable to parts of works or the relevant trades. It may comprise preliminary or general clauses as well as particular clauses.

6 This document itemises the work described in the drawings and specification. It will be split into sections or elements frequently in accordance with the rules or recommendations of standard methods of measurement (there are separate methods for building works and civil engineering works). As to the effect of the omission of work from the bills see eg *C Bryant & Son Ltd v Birmingham Hospital Saturday Fund* [1938] 1 All ER 503; and *AE Farr Ltd v Ministry of Transport* (1965) 5 BLR 94, HL.

7 This document is used especially where the rates and prices in the bill of quantities may not be applicable to variations and some scheme of valuation on a time and materials basis is needed (commonly called dayworks).

8 See eg *Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd* (1985) 32 BLR 114; *Holland Dredging (UK) Ltd v Dredging & Construction Co Ltd (Imperial Chemical Industries plc, third party)* (1987) 37 BLR 1, CA.

9 This is not always incorporated as it can subject the parties to obligations which may be incapable of fulfilment.

10 See eg *MJ Gleeson (Contractors) Ltd v Hillingdon London Borough Council* (1970) 215 Estates Gazette 165.

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12. Collateral contracts and warranties.

In the ordinary course of business pre-contract statements¹ may be made which may be enforceable, for example, as collateral contracts or warranties². In the construction industry it is common for special contracts or warranties³ to be made or given to enable a person to pursue a remedy otherwise than through a contractual chain of responsibility because it may not be practicable or possible to do so. For example, nominated sub-contractors are generally required to give undertakings to the employer as to design where a main contractor is or may not be liable for that design⁴. Similarly, because a lessee may have no claim in respect of defects in a new building, those primarily responsible for its construction may give undertakings in the nature of indemnities directly to the lessee (usually by deed). The stipulations in such contracts or warranties may be treated as if they had been contained in a building contract⁵.

1 Post-contract statements may also be made: see *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1, HL.

2 See eg *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113, DC; *Birch v Paramount Estates Ltd* (1956) 167 Estates Gazette 396, CA; *Shanklin Pier Co Ltd v Detel Products Ltd* [1951] 2 KB 854, [1951] 2 All ER 471; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 QB 170, [1964] 1 All ER 41; *George Fischer Holdings Ltd v Multi Design Consultants Ltd* (1998) 61 ConLR 85. As to collateral warranties or contracts see CONTRACT vol 9(1) (Reissue) para 753.

3 Standard forms have been published by, for example, the Joint Contracts Tribunal. As to standard forms of contract see para 2 ante.

4 As to the influence of the possibility of obtaining such a contract see *Greater Nottingham Co-Operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, 41 BLR 43, CA. As to sub-contracting generally see para 40 et seq post.

5 An employer can confer an enforceable benefit upon a lessee in his building contract with the contractor: see the Contracts (Rights of Third Parties) Act 1999; and CONTRACT.

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13. International contracts.

It is occasionally necessary to determine the law applicable to a building contract where it is not expressly selected. The selection of a law governing building contracts will be determined by the rules relating to the choice of the applicable law or proper law of the contract¹. If the law has to be inferred then the law of the country where the building works are to be carried out will normally be the proper law unless there are circumstances which will impute to the parties an intention that some other law will apply².

1 See CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq.

2 Thus, where works were to be carried out in Scotland by a Scottish builder but for English building owners under a contract in the English standard form, the proper law was held to be English law: *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583, [1970] 1 All ER 796, HL. Yet where work was to be carried out in Iraq by a Northern Irish sub-contractor for an English contractor under a main contract for an Iraqi employer which was governed by Iraqi law, it was held that the proper law of the sub-contract was Iraqi law because the sub-contract had to operate in conjunction with the main contract, even though the sub-contract was in the standard form intended for use with the United Kingdom ICE Conditions: *JMJ Contractors Ltd v Marples Ridgway Ltd* (1985) 31 BLR 100. As to ICE conditions of contract see para 2 ante. Note, however, that these cases were decided before the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) had force of law in the United Kingdom. The Rome Convention is set out in the Contracts (Applicable Law) Act 1990 s 2 (as amended), Sch 1 (as amended): see CONFLICT OF LAWS vol 8(3) (Reissue) para 349 et seq.

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(3) AGREEMENT, CONSIDERATION AND FACTORS VITIATING AGREEMENT

(i) Tenders and Estimates

14. Tenders.

Where the contractor agrees to carry out work without more but in the expectation of payment, the employer must pay a reasonable sum in respect of the work done¹. To obtain a fixed price for the work, an employer will often seek estimates or tenders from contractors. Choice of name is immaterial; there is no custom that a document headed 'quotation' or 'estimate' or even 'budget price' should not be treated as an offer².

The conduct of contractor and employer at the tender stage is restricted by domestic and European Community legislation against protectionism and unfair competition, mainly in relation to public works above a specified value³.

1 See eg *Whittle v Frankland* (1862) 2 B & S 49; *Re Walton-on-the-Naze UDC and Moran* (1905) 2 Hudson's BC (4th Edn) 376; *Ramsden & Carr v Chessum & Sons and Ward* (1913) 110 LT 274, HL.

2 *Croshaw v Pritchard and Renwick* (1899) 16 TLR 45.

3 See para 22 et seq post.

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15. Invitation to tender.

Letters asking contractors to tender for work are invitations to treat; it is generally unnecessary for the building owner or employer to state that he does not bind himself to accept the lowest tender¹. Where such a letter states that the lowest tender will be accepted² or where the parties have negotiated on that basis³, the letter may amount to an offer⁴. An invitation to tender may be revoked at any time, and a tender may be withdrawn at any time before acceptance on giving notice to the employer⁵. A tender will also lapse if it is not accepted within a reasonable time⁶.

If a tender is rejected, a contractor will generally be unable to claim the costs of preparing the tender from the building owner⁷. Where a contractor performs services beyond those necessary for the submission of his tender in the reasonable expectation of payment, the contractor may recover on a quantum meruit basis⁸.

1 *Spencer v Harding* (1870) LR 5 CP 561. See, however, in relation to public works contracts para 22 et seq post. For the distinction between offers and invitations to treat see CONTRACT vol 9(1) (Reissue) para 632 et seq.

2 Cf *Spencer v Harding* (1870) LR 5 CP 561 at 563 per Willes J; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL.

3 See *Pauling v Pontifex* (1852) 20 LTOS 126.

4 It must be capable of amounting to an offer: see *Gibson v Manchester City Council* [1979] 1 All ER 972, [1979] 1 WLR 294, HL. Further, failure to consider a tender may amount to a breach of contract: *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1895, CA. See also *Harmon CFEN Façades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 ConLR 1 at 168-169 per Judge Lloyd QC (which concerned invitations to tender in relation to contracts subject to the Public Works Contracts Regulations 1991, SI 1991/2680 (as amended) (see para 23 et seq post)).

A tender may be rejected by reason of disqualifying factors personal to the tenderer: see *Fairclough Building Ltd v Port Talbot Borough Council* (1992) 62 BLR 82, CA (where a director of the tenderer was married to the council's principal architect).

5 *Bristol, Cardiff & Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616; *Byrne & Co v Van Tienhoven* (1880) 5 CPD 344; and CONTRACT vol 9(1) (Reissue) para 644.

6 *Murray v Rennie and Angus* (1897) 24 R 965, Ct of Sess. What is a reasonable time is a question of fact; in *Metropolitan Asylums Board of Managers v Kingham & Sons* (1890) 6 TLR 217 at 218, Fry LJ said that reasonable time can never extend after the time at which the contract was to commence.

7 See *Harris v Nickerson* (1873) LR 8 QB 286; and AUCTION. In *Marston Construction Co Ltd v Kigass* (1989) 46 BLR 109, the costs of tendering were awarded on the basis of an implied request (sed dubitante). If the invitation to the contractor was made fraudulently and without any intention of accepting the tender in any event, the costs of tendering may be recoverable as damages for deceit: *Richardson v Silvester* (1873) LR 9 QB 34, DC.

8 *Sinclair v Logan* 1961 SLT 10, Sh Ct; *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932; *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, 24 BLR 94 per Robert Goff J; and see *Sabemo Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, NSW SC. See also *Regalian Properties plc v London Docklands Development Corp* [1995] 1 All ER 1005, [1995] 1 WLR 212 (contractor cannot recover costs of preparation for contract where tender accepted subject to contract). As to quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) paras 7, 113 et seq.

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16. Unfair competition.

At common law, an agreement made by deed between two or more persons that one should not tender or should tender at an excessive price is valid and enforceable¹. Such an agreement is not unlawful so as to give rise to an action for conspiracy². However, agreements between undertakings which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom are prohibited and void³. Similar principles apply to agreements between undertakings which may affect trade between member states of the European Community⁴.

Many contractors subscribe for membership of trade associations. Stipulations in the rules of the association that members should press a proposed employer to accept standard conditions or should charge for work at particular rates, may amount to a breach of United Kingdom or Community competition law⁵.

Collusive practices not embodied in any formal or informal agreement between tenderers, or between employers inviting tenders, may also be unlawful. As well as agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom, and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited and void⁶. Similar provisions apply to agreements between undertakings which may affect trade between member states of the European Community⁷. A tenderer or employer in a dominant position in the market⁸ will be restricted from abusing that position at the tender stage as at other stages if trade within the United Kingdom, or between member states of the European Community, is affected⁹.

1 *Jones v North* (1875) LR 19 Eq 426; *Re Electrical Installations at Exeter Hospital Agreement* [1971] 1 All ER 347, [1970] 1 WLR 1391.

2 *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25, HL; *Sorrell v Smith* [1925] AC 700, HL; *Crofter Hand-Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, [1942] All ER 142, HL.

3 See the Competition Act 1998 s 2(1), (4); and COMPETITION vol 18 (2009) PARA 116. Certain agreements are excluded (see COMPETITION vol 18 (2009) PARAS 117-120), and provision is also made for exemption from the prohibition (see COMPETITION vol 18 (2009) PARA 121-124). Investigations may be conducted if it is suspected that the prohibition has been infringed: see COMPETITION vol 18 (2009) PARA 129 et seq. As to enforcement see COMPETITION vol 18 (2009) PARA 135 et seq.

4 See the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179) art 81 (formerly art 85 and renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ); and COMPETITION vol 18 (2009) PARA 61 et seq. EC Treaty art 81(1) (as renumbered) may be inapplicable in the case of certain agreements, decisions and practices: see art 81(3) (as so renumbered); and COMPETITION vol 18 (2009) PARAS 66, 67. See also EC Commission Notice of December 1997 concerning Agreements of Minor Importance (OJ C372, 9.12.97, p 13), which states that 'only those agreements are prohibited which have an appreciable impact on market conditions'; and COMPETITION vol 18 (2009) PARA 64. Undertakings may be investigated by the European Commission (see COMPETITION vol 18 (2009) PARA 90) and sanctions and penalties imposed in relation to any infringement (see COMPETITION vol 18 (2009) PARA 107 et seq).

5 See the Competition Act 1998 s 2(1); EC Treaty art 81 (as renumbered); notes 3-4 supra; COMPETITION vol 18 (2009) PARAS 61, 116 et seq. Cf *Re Birmingham Association of Building Trades Employers' Agreement* [1963] 2 All ER 361, [1963] 1 WLR 484 (decided under the Restrictive Trade Practices Act 1976 (repealed)).

6 See note 3 supra.

7 See note 4 supra.

8 Elements of the construction or engineering industries may constitute a market in themselves.

9 See the Competition Act 1998 s 18; EC Treaty art 82 (formerly art 86 and renumbered by virtue of the Treaty of Amsterdam); and COMPETITION vol 18 (2009) PARAS 68 et seq, 125 et seq.

There are some cases excluded from the prohibition under the Competition Act 1998 s 18: see COMPETITION vol 18 (2009) PARA 126 et seq. Investigations may be conducted if it is suspected that the prohibition has been infringed: see COMPETITION vol 18 (2009) PARA 129 et seq. As to enforcement see COMPETITION vol 18 (2009) PARA 135 et seq.

In relation to EC Treaty art 82 (as renumbered), undertakings may be investigated by the European Commission (see COMPETITION vol 18 (2009) PARA 90) and sanctions and penalties imposed in relation to any infringement (see COMPETITION vol 18 (2009) PARA 107 et seq).

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17. Acceptance of a tender.

The unconditional acceptance of a tender gives rise to a contract¹. An acceptance is effective when communicated to the tenderer². Where the parties are otherwise agreed on the terms of the contract but acceptance is made subject to a condition that a formal document should be executed, it is a question of construction whether such a condition is a condition precedent which prevents a concluded contract from arising³. The use of the term 'subject to contract' is a strong indication that no enforceable obligation was intended to arise before the execution of a formal document⁴; but a statement in the acceptance that a formal contract is being prepared may not prevent a binding contract arising⁵.

Where the acceptance of a tender is qualified by the introduction of a new term, a counter offer has been made to the tenderer which will require acceptance if a contract is to be concluded⁶. Such an acceptance can be made by conduct and a contractor who starts work, or an employer who permits work to be started, after the receipt of a counter offer and without objection to the terms of the counter offer will be taken to have accepted those terms by conduct⁷. There is no concluded contract where the parties stipulate that certain matters be left for further agreement⁸. Where at the date the work is begun the parties have not reached full agreement on all the terms of the contract, on their arriving at full agreement the resultant contract will, unless otherwise agreed, normally have effect retrospectively to the date on which the work was begun⁹. Acceptance of a tender must be unambiguous¹⁰.

1 *Wimshurst v Deeley* (1845) 2 CB 253; *Thorn v Public Works Comrs* (1863) 32 Beav 490; *Tancred, Arrol & Co v Steel Co of Scotland Ltd* (1890) 15 App Cas 125, HL; *Nicolene Ltd v Simmonds* [1953] 1 QB 543, [1953] 1 All ER 822, CA. Where, however, the invitation to tender is for such goods as may be ordered from time to time (a standing offer), although the acceptance of the offer binds the tenderer, the other party is not liable until an order is placed: see *Great Northern Ry Co v Witham* (1873) LR 9 CP 16; *A-G v Stewards & Co Ltd* (1901) 18 TLR 131, HL. As to offer and acceptance see CONTRACT vol 9(1) (Reissue) paras 631-675.

2 *Willcocks and Barnes v Paignton Co-operative Society Ltd* (1930) 74 Sol Jo 247. See also CONTRACT vol 9(1) (Reissue) para 659. Special rules may apply where an acceptance is made by post, e-mail, telex or fax see eg *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327, [1955] 2 All ER 493, CA; *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34, [1982] 1 All ER 293, HL; and CONTRACT vol 9(1) (Reissue) para 676 et seq.

3 See eg *Rossiter v Miller* (1878) 3 App Cas 1124, HL; *Filby v Hounsell* [1896] 2 Ch 737; *Branca v Cobarro* [1947] KB 854, [1947] 2 All ER 101, CA; *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, CA; *Metal Scrap Trade Corpn v Kate Shipping Co Ltd, The Gladys (No 2)* [1994] 2 Lloyd's Rep 402. See also CONTRACT vol 9(1) (Reissue) paras 669-670.

4 *Rossdale v Denny* [1921] 1 Ch 57, CA, especially per Lord Sterndale MR at 66; but see *Law v Jones* [1974] Ch 112, [1973] 2 All ER 437, CA; *Alpenstow Ltd v Regalian Properties plc* [1985] 2 All ER 545, [1985] 1 WLR 721; *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] BLR 33, CA; cf *Fraser Williams v Prudential Holborn Ltd* (1993) 64 BLR 1, CA. As to conditional agreements see CONTRACT vol 9(1) (Reissue) para 670.

5 *Lewis v Brass* (1877) 3 QBD 667, CA; and cf the ICE form of tender, which provides that unless and until a formal agreement is prepared and executed, the tender, together with written acceptance of it, constitutes a binding contract between the parties. As to standard forms see para 2 ante. See also CONTRACT vol 9(1) (Reissue) para 669.

6 *Hyde v Wrench* (1840) 3 Beav 334; *Trollope and Colls Ltd and Holland, Hannen and Cubitts Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333; *Butler Machine Tool Co Ltd v Ex-Cell-O-Corpn*

(England) Ltd [1979] 1 All ER 965, [1979] 1 WLR 401, CA. As to counter-offers see CONTRACT vol 9(1) (Reissue) para 663.

7 *Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 113 Sol Jo 262, 67 LGR 395; *Sauter Automation Ltd v Goodman (Mechanical Services) Ltd (in liquidation)* (1986) 34 BLR 81; *G Percy Trentham v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, (1992) 63 BLR 44, CA; and see CONTRACT vol 9(1) (Reissue) para 664.

8 *Bozson v Altrincham UDC* (1903) 67 JP 397, CA; *May and Butcher v R* [1934] 2 KB 17n, HL. See also *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA; *Munton v GLC* [1976] 2 All ER 815, [1976] 1 WLR 649, CA; cf *Foley v Classique Coaches Ltd* [1934] 2 KB 1, CA. As to incomplete agreements see CONTRACT vol 9(1) (Reissue) para 667.

9 *Trollope and Colls Ltd and Holland, Hannen and Cubitts Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333.

10 *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234 (two tenders submitted; acceptance of 'your tender' led to no contract).

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18. Rights and obligations created by tendering.

If the contractor carries out work, such as preparing designs, schedules or estimates, as part of the tendering process in the reasonable belief either that he will be paid for these services or that the contract will be placed with him, he is entitled to reasonable remuneration for that work on a quantum meruit basis¹. Equally, the contractor is entitled to remuneration where the employer makes use of the contractor's input into his tender or causes him to carry out work beyond that reasonably necessary in the circumstances².

An employer is not usually bound to keep the tender period open for the advertised period, to open and consider every valid tender or to accept any, or the lowest tender. Equally, a contractor may withdraw his tender prior to its acceptance even if it is stated to be irrevocable since there is no general obligation to negotiate in good faith³. However, any irrevocable commitment by either the employer or the tenderer that is supported by consideration may not be withdrawn⁴.

1 As to quantum meruit see *RESTITUTION* vol 40(1) (2007 Reissue) paras 7, 113 et seq.

2 *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 132; *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, 24 BLR 94; *Sabemo Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, NSW SC; *Marston Construction Co Ltd v Kigass* (1989) 46 BLR 109. See also *Regalian Properties v London Docklands Development Corpn* [1995] 1 All ER 1005, [1995] 1 WLR 212 (contractor cannot recover costs of preparation for contract where tender accepted subject to contract). For valuation on a quantum meruit basis see eg *Serck Controls Ltd v Drake & Scull Engineering Ltd* (2000) 73 ConLR 100.

3 *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453, HL. See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439, [1988] 1 All ER 348 at 352-353, CA, per Bingham LJ.

4 *Percival Ltd v LCC Asylums and Mental Deficiency Committee* (1918) 87 LJB 677; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25, [1990] 1 WLR 1195, CA. In *Northern Construction Co Ltd v Gloge Heating and Plumbing Ltd* [1986] 2 WWR 649, 27 DLR (4th) 265, Alta CA, a sub-contractor was held to his tender, despite its purported withdrawal; the court relied on the custom of the Canadian industry that such tenders are irrevocable. See also *R v Ron Engineering and Construction Eastern Ltd* (1981) 119 DLR (3rd) 267, Can SC.

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19. Letters of intent.

A letter of intent is a communication expressing an intention to enter into a contract in the future. The effect of such a communication depends upon the objective meaning of the words used¹. The various possibilities are: it may have no binding effect², it may take effect as an executory ancillary contract entitling the recipient to costs consequently incurred if the intended contract does not materialise, or it may affect a contractual offer to the effect that if the recipient undertakes the proposed action, he will be remunerated either reasonably or by the terms he states³. Finally, the recipient might be entitled to reasonable remuneration where he acts to the benefit of the sender pursuant to the communication⁴.

1 *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, (1981) 24 BLR 94.

2 As was the finding in *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, (1981) 24 BLR 94, where, however, the contractor recovered on a quantum meruit basis.

3 *Turriff Construction Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20; *Edwin Hill & Partners v Leakcliffe Properties Ltd* (1984) 29 BLR 43. See also *Monk Construction Ltd v Norwich Union Life Assurance Society* (1992) 62 BLR 107, CA; *Drake & Scull Engineering Ltd v Higgs & Hill Northern Ltd* (1994) 11 Const LJ 214; *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] BLR 33, CA.

4 *Wilson Smithett & Cape (Sugar) Ltd v Bangladesh Sugar and Food Industries Corpn* [1986] 1 Lloyd's Rep 378.

UPDATE

19 Letters of intent

NOTE 3--A letter of intent may be appropriate when the price is either agreed or there is a clear mechanism in place for it to be agreed, the contract terms are, or are very likely to be, agreed and there are good reasons to start work in advance of the finalisation of all the contract documents: *Cunningham v Collett* [2006] EWHC 1771 (TCC), (2007) 113 ConLR 143.

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20. Failure to finalise contract and estoppel.

If a contractor carries out work in circumstances in which no contract has been concluded, he may, but will not necessarily, be entitled to remuneration on a quantum meruit basis¹. The rates or basis of remuneration that would have been included in the contract had it been concluded will be taken into account in determining that reasonable remuneration². If both parties have proceeded on the basis that a binding contract has been entered into that governs their relationship, both parties may be estopped by convention from subsequently denying that there was a contract governing their relationship³.

¹ See para 18 ante.

² See eg *Trollope and Colls Ltd and Holland and Hannen and Cubitts Ltd v Atomic Power Constructions Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333; *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248, CA; *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234.

³ *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA; *Whittall Builders Co Ltd v Chester-le-Street District Council* (1987) 40 BLR 82; *Mitsui Babcock Energy Ltd v John Brown Engineering Ltd* (1996) 51 ConLR 129; cf *Russell Bros (Paddington) Ltd v John Lelliott Management Ltd* (1991) 11 Const LJ 377.

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(ii) Consideration

21. Necessity for consideration.

Except in the case of a contract made by deed, consideration is necessary to support a contract¹. In a building contract context the consideration given by the employer is the amount paid or the promise to make payment, and by the contractor in executing the works or promising to do so. A promise for additional payment for work included in the contract or a promise to carry out other existing contractual obligations such as those concerned with the time for completion is given without consideration², unless it provides the other party with a genuine practical benefit³, or there is uncertainty whether or not an item of work falls within the original contract⁴. An agreement to pay existing liabilities by instalments may not be good consideration⁵.

Any other variation of the terms of the contract will generally be unenforceable unless supported by fresh consideration⁶. A mere promise by a builder to perform work without any mention of price needs to be supported by some consideration in order to become binding on him⁷, but, if he is employed to do the work, that is sufficient consideration as it implies an agreement to pay reasonable remuneration for the work done and the materials supplied⁸.

If the consideration for the contract is illegal, the contract is not enforceable⁹.

1 See CONTRACT vol 9(1) (Reissue) para 727 et seq.

2 *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597 at 608 per James LJ; *Harris v Watson* (1791) Peake 102; *Stilk v Myrick* (1809) 2 Camp 317; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641. This includes promises given under 'economic duress': *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* supra; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA (where no such duress was found); and see *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA; and CONTRACT vol 9(1) (Reissue) para 711.

3 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA.

4 *Williams v O'Keefe* [1910] AC 186 at 191, PC; *Simon Container Machinery Ltd v Emba Machinery AB* [1998] 2 Lloyd's Rep 429.

5 *Re Selectmove* [1995] 2 All ER 531, [1995] 1 WLR 474, CA.

6 See paras 74, 146 et seq post; and CONTRACT vol 9(1) (Reissue) para 727 et seq.

7 *Ramsden and Carr v Chessum & Sons and Ward* (1913) 110 LT 274, HL.

8 See eg *Whittle v Frankland* (1862) 2 B & S 49. See also the cases in paras 14 ante, 153 post.

9 *Windhill Local Board of Health v Vint* (1890) 45 ChD 351, CA; *Taylor v Bhail* (1995) 50 ConLR 70, CA; but if the contract is unenforceable only in law a builder may recover in restitution: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, (1987) 6 Const LJ 59, Aust HC; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA; and see RESTITUTION.

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(iii) Public Works Contracts

22. General principles of EC law applicable to tenders to public bodies.

Invitations to tender from public bodies are subject to the provisions of the EC Treaty¹ concerning free movement of goods and services². Conditions attached to invitations to tender which restrict the free movement of goods, have equivalent effect to such a restriction, or discriminate on the grounds of nationality are in breach of the EC Treaty and will be struck down if proceedings are brought by the EC Commission against the member state concerned. Thus provisions requiring compliance of tender materials and tenderers with national standards may have equivalent effect to a restriction³. The mere fact that a particular contract is exempted from the specific provisions relating to public works contracts⁴ does not absolve the member state from observing the general provisions of the Treaty⁵.

1 The Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179), acceded to by the United Kingdom by virtue of the Act of Accession 1972.

2 As to the free movement of goods see the EC Treaty Pt 3, Title I (arts 23-31) (as renumbered by virtue of the Treaty of Amsterdam: see para 16 note 4 ante). As to the free movement of persons, services and capital see the EC Treaty Pt 3, Title III (arts 39-55) (as renumbered).

3 Case 45/87 *Re Dundalk Water Supply System, EC Commission v Ireland* [1989] 1 CMLR 225, 44 BLR 1, ECJ. Similarly, laws providing that nationalised entities should be preferred to private entities have been held to be contrary to Community law: Case 3/88 *EC Commission v Italy* [1989] ECR 4035, ECJ.

4 See EEC Council Directive 93/37 (OJ L199, 9.8.93, p 54) concerning the co-ordination of procedures for the award of public works contracts (as amended): and paras 23-26 post.

5 Case 45/87 *Re Dundalk Water Supply System, EC Commission v Ireland* [1989] 1 CMLR 225, 44 BLR 1, ECJ.

UPDATE

22 General principles of EC law applicable to tenders to public bodies

NOTE 3--See Case C-456/08 *European Commission v Ireland* [2010] All ER (D) 205 (Jan), ECJ (candidate unable to predict with certainty which national limitation period would be accorded for purposes of bringing proceedings).

NOTE 5--See Case C-59/00 *Vestergaard v Spottrup Boligselskab* [2002] 2 CMLR 1112, ECJ (clause in tender document providing that specified Danish make of product was to be used constituted infringement of EC Treaty arts 6, 30).

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23. Public works contracts.

Contracts with government departments and certain other authorities, and the tendering procedures relating to any such contracts, are, with specified exceptions, subject to European Community directives on the co-ordination of procedures for the advertisement and award of public works, public supply and public services contracts¹, and these directives have been implemented by regulations in the United Kingdom². The regulations relating to public works contracts³ require certain public bodies ('contracting authorities')⁴ to use specified tendering procedures⁵ when they are seeking offers in relation to a proposed public works contract⁶. 'Public works contract' means a contract in writing for consideration (whatever the nature of the consideration): (1) for the carrying out⁷ of a work or works for a contracting authority⁸; or (2) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements⁹. The activities constituting such works are, for example, general building and engineering work, demolition work, the construction of flats, office blocks, hospitals and other buildings, both residential and non-residential, the construction of roads and bridges, installation work and building completion work¹⁰. 'Contractor' means a person who sought, or who seeks, or would have wished, to be the person to whom a public works contract is awarded, and who is a national of and established in a relevant state¹¹. When the regulations apply, a contracting authority must not treat a person who is not a national of, and established in, a relevant state more favourably than one who is¹².

Contracts governing certain areas of public works are exempted, and the regulations do not apply to the seeking of offers in relation to a public works contract where, for example, the contracting authority is a utility, the contract is classified as a secret or subject to special security measures or where different procedures govern the procedures leading to the award of the contract and it is to be entered into in pursuance of international agreements¹³.

Further, the regulations do not apply to the seeking of offers in relation to: (a) a proposed public works contract where the estimated value of the contract (net of value added tax) at the relevant time is less than the euro equivalent of 5,000,000 special drawing rights¹⁴; (b) a proposed public works concession contract or a proposed subsidised works contract¹⁵ where the estimated value of the contract (net of value added tax) at the relevant time is less than 5,000,000 euros¹⁶. A contracting authority must not enter into separate public works contracts with the intention of avoiding the application of the regulations to those contracts¹⁷.

Special provision is made in relation to public housing scheme works contracts¹⁸ and public works concession contracts¹⁹.

The obligation on a contracting authority to comply with the regulations is a duty owed to contractors and Government Procurement Agreement ('GPA') providers²⁰ and breach of that duty is actionable by any contractor or GPA provider who, in consequence, suffers, or risks suffering, loss or damage²¹.

1 See EEC Council Directive 92/50 (OJ L209, 24.7.92, p 1) relating to the co-ordination of procedures for the award of public service contracts (amended by EC Parliament and Council Directive 97/52 (OJ L328, 28.11.97, p 1); EC Commission Directive 2001/78 (OJ L285, 29.10.2001)); EEC Council Directive 93/36 (OJ L199, 9.8.93, p 1) co-ordinating procedures for the award of public supply contracts (amended by EC Parliament and Council Directive 97/52 (OJ L328, 28.11.97, p 1); EC Commission Directive 2001/78 (OJ L285, 29.10.2001)); EEC Council

Directive 93/37 (OJ L199, 9.8.93, p 54) concerning the co-ordination of procedures for the award of public works contracts (amended by EC Parliament and Council Directive 97/52 (OJ L328, 28.11.97, p 1); EC Commission Directive 2001/78 (OJ L285, 29.10.2001)).

2 See the Public Works Contracts Regulations 1991, SI 1991/2680 (amended by SI 1992/3279; SI 1995/201; SI 1996/2911; SI 1999/1042; SI 1999/1820; SI 2000/2009) (see the text and notes *infra*; and paras 24-26 *post*); the Public Supply Contracts Regulations 1995, SI 1995/201 (as amended); the Public Services Contracts Regulations 1993, SI 1993/3228 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 492.

Provision has also been made in relation to co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors: see EEC Council Directive 93/38 (OJ L199, 9.8.93, p 84) co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (as amended), which has been implemented in the United Kingdom by the Utilities Contracts Regulations 1996, SI 1996/2911 (as amended).

3 See the Public Works Contracts Regulations 1991, SI 1991/2680 (as amended).

4 For the purposes of the Public Works Contracts Regulations 1991, SI 1991/2680 (as amended) each of the following is a 'contracting authority': (1) a Minister of the Crown; (2) a government department; (3) the House of Commons (see PARLIAMENT vol 78 (2010) PARA 892 *et seq*); (4) the House of Lords (see PARLIAMENT vol 78 (2010) PARA 828 *et seq*); (5) the Northern Ireland Assembly Commission; (6) the Scottish Parliamentary Body Corporate; (7) the National Assembly for Wales (see CONSTITUTIONAL LAW AND HUMAN RIGHTS); (8) a local authority (see *infra*; and LOCAL GOVERNMENT vol 69 (2009) PARA 1 *et seq*); (9) a fire authority constituted by a combination scheme under the Fire Services Act 1947 (see FIRE SERVICES vol 18(2) (Reissue) para 24 *et seq*); (10) the Fire Authority for Northern Ireland; (11) a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) para 139); (12) a police authority established under the Police (Scotland) Act 1967 s 2 (as amended); (13) the Northern Ireland Policing Board; (14) an authority established under the Local Government Act 1985 s 10 (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 17); (15) a joint authority established by Pt IV (ss 23-42) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARAS 47-53); (16) any body established pursuant to an order under s 67 (see LOCAL GOVERNMENT vol 69 (2009) PARA 17); (17) the Broads Authority (see WATER AND WATERWAYS vol 101 (2009) PARAS 734-736); (18) any joint board the constituent members of which consist of any of the bodies specified in heads (8), (9), (11), (12), (14), (15), (16) and (17) *supra*; (19) a national park authority established by an order under the Environment Act 1995 s 63 (see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526 *et seq*); (20) the Receiver for the Metropolitan Police District (as to police generally see POLICE); (21) a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and (a) financed wholly or mainly by another contracting authority; or (b) subject to management supervision by another contracting authority; or (c) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, being appointed by another contracting authority; (22) an association of or formed by one or more of the above; and (23) to the extent not specified in heads (1)-(20) *supra*, an entity specified in the Public Supply Contracts Regulations 1995, SI 1995/201, Sch 1 (as substituted and amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 492); Public Works Contracts Regulations 1991, SI 1991/2680, reg 3(1) (reg 3 substituted by SI 2000/2009; and amended by the Police (Northern Ireland) Act 2000 s 2(4), Sch 2 para 6(1)). 'Minister of the Crown' means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury and a reference to a Minister of the Crown is to be read as including a reference to the Scottish Ministers: Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1) (definition amended by SI 1999/1042). As to Ministers of the Crown see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 354 *et seq*. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 512-517. 'Government department' includes a Northern Ireland department or the head of such department and any part of the Scottish Administration: Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1) (definition amended by SI 1999/1042). In the application of the Public Works Contracts Regulations 1991, SI 1991/2680, to England, 'local authority' means: (i) a county council, a district council, a London borough council, a parish council, a community council or the Council of the Isles of Scilly; (ii) the Common Council of the City of London in its capacity as local authority or police authority: reg 3(2) (as so substituted). In the application of the Public Works Contracts Regulations 1991, SI 1991/2680, to Wales, 'local authority' in heads (1)-(23) *supra* means a county council, county borough council or community council: reg 3(3) (as so substituted). For the meaning of 'local authority' for these purposes in relation to Scotland see reg 3(4) (as so substituted), and in relation to Northern Ireland see reg 3(5) (as so substituted). Where an entity specified in heads (1)-(23) *supra* does not have the capacity to enter into a contract, the contracting authority in relation to that entity is a person whose function it is to enter into contracts for that entity: reg 3(6) (as so substituted). As to areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 *et seq*. As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) para 51 *et seq*.

5 See para 24 *post*.

6 See the Public Works Contracts Regulations 1991, SI 1991/2680, reg 5. The Public Works Contracts Regulations 1991, SI 1991/2680, apply whenever a contracting authority seeks offers in relation to a proposed public works contract other than public works contracts excluded from the operation of the Regulations by regs 6, 7 (both as amended) (see the text and notes 13-14, 16-17 *infra*); except that in Pt II (reg 8) (as amended)

(see para 24 post), Pt III (regs 9-13) (as amended) (see para 24 post), Pt IV (regs 14-19) (as amended) (see para 25 post) and Pt V (regs 20-22) (as amended) (see para 26 post) and in reg 24 (see para 24 post), reg 27 (see para 24 post) and reg 28 (as substituted) (see para 26 post), reference to a 'public works contract' does not include a public works concession contract: reg 5. 'Public works concession contract' means a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract: reg 2(1). 'Work' means the outcome of any works which is sufficient of itself to fulfil an economic and technical function: reg 2(1). 'Works' means any of the activities specified in reg 2(1), Sch 1 (see the text and note 10 infra) being activities contained in the general industrial classification of economic activities within the Communities: reg 2(1).

It has been held that EEC Council Directive 93/36 (OJ L199, 9.8.93, p 1) co-ordinating procedures for the award of public supply contracts (as amended), does not apply to decisions by contracting authorities to do the work itself: see Case C-107/98 *Teckal Srl v Comune di Viano* [1999] ECR I-8121, ECJ. However, the Public Works Contracts Regulations 1991, SI 1991/2680 provide that contracting authorities must award a public works contract on the basis of the offer which offers the lowest price or is the most economically advantageous to the contracting authority, and 'offer' includes a bid by one part of a contracting authority to carry out work or works for another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons: see reg 20(1), (8).

7 'Carrying out', in relation to a work or works, means the construction or the design and construction of that work or those works: *ibid* reg 2(1).

8 *Ibid* reg 2(1)(a).

9 *Ibid* reg 2(1)(b).

10 See *ibid* reg 2(1), Sch 1. Construction and engineering contracts consisting chiefly in the supply of products to public authorities together with their installation or siting are likely to be public supply contracts, and the tendering procedures in relation to such contracts may be subject to the Public Supply Contracts Regulations 1995, SI 1995/201 (as amended) (see the text and note 2 supra; and LOCAL GOVERNMENT vol 69 (2009) PARA 492).

11 Public Works Contracts Regulations 1991, SI 1991/2680, reg 4(1) (amended by SI 2000/2009). 'National of a relevant state' means, in the case of a person who is not an individual, a person formed in accordance with the laws of a relevant state and which has its registered office, central administration or principal place of business in a relevant state: Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1) (definition amended by SI 1995/201). 'Relevant state' means a member state or a state for the time being specified in the Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1), Sch 3 (added by SI 2000/2009): Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1) (definition substituted by SI 2000/2009).

12 Public Works Contracts Regulations 1991, SI 1991/2680, reg 4(2) (amended by SI 1995/201). Further, in making the selection of, and issuing invitations to tender or invitations to negotiate to, contractors, the contracting authority must not discriminate between contractors on the grounds of their nationality or the relevant state in which they are established: see the Public Works Contracts Regulations 1991, SI 1991/2680, regs 12(5), 13(8) (both amended by SI 1995/201). The European Court of Justice has made it clear that, in relation to public works contracts in general, there is a duty to observe the principle of equal treatment of tenderers: see Case C-243/89 *EC Commission v Denmark* [1993] ECR I-3353, ECJ.

13 See the Public Works Contracts Regulations 1991, SI 1991/2680, reg 6 (amended by SI 1992/3279; SI 1995/201; SI 1996/2911).

14 See the Public Works Contracts Regulations 1991, SI 1991/2680, reg 7(1)(a) (reg 7(1) substituted by SI 2000/2009). As to the thresholds see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 7 (amended by SI 2000/2009).

15 As to subsidised works contracts see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 23.

16 See *ibid* reg 7(1)(b) (as substituted: see note 14 supra).

17 See *ibid* reg 7(8).

18 See *ibid* reg 24. 'Public housing scheme works contract' means a public works contract relating to the design and construction of a public housing scheme: reg 2(1).

19 See *ibid* reg 25. For the public works concession contract notice see reg 25, Sch 2 Pt F (substituted by SI 2000/2009). Provision is also made as to sub-contracting the work or works to be carried out under a public works concession contract: see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 26, Sch 2 Pt G (substituted by SI 2000/2009). As to the publication of notices see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 30.

20 See *ibid* reg 2(1) (definition added by SI 2000/2009); Public Works Contracts Regulations 1991, SI 1991/2680, reg 31(1), (1A) (added by SI 2000/2009). 'Government Procurement Agreement' means the Agreement on Government Procurement between certain parties to the World Trade Organisation (WTO) Agreement (Marrakesh, 15 April 1994; TS 53 (1996); Cm 3265); Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1) (definition added by SI 2000/2009). For these purposes, a 'GPA provider' means a person from a GPA state who sought, or who seeks, or would have wished, to be the person to whom the contract is awarded: Public Works Contracts Regulations 1991, SI 1991/2680, reg 31(9)(a) (reg 31(9) added by SI 2000/2009). A 'GPA state' means any country other than a relevant state which, at the relevant time is a signatory to the GPA and has agreed with the European Community that the GPA applies to a contract of the type to be awarded: Public Works Contracts Regulations 1991, SI 1991/2680, reg 31(9)(b) (as so added). 'Relevant time' means the date on which the contracting authority would have sent a contract notice in respect of the contract to the Official Journal of the European Communities if it had been required by the Public Works Contracts Regulations 1991, SI 1991/2680 (as amended) to do so: reg 31(9)(c) (as so added).

21 *Ibid* reg 31(1B) (added by SI 2000/2009); Public Works Contracts Regulations 1991, SI 1991/2680, reg 31(3) (amended by SI 2000/2009). As to the enforcement of obligations relating to public works contracts see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 31 (amended by SI 1992/3279; SI 1995/201; SI 2000/2009).

UPDATE

23 Public works contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--See now EC Council Directive 2004/18 (OJ L134, 30.4.2004, p 114) (amended by EC Commission Directive 2005/51 (OJ L257, 1.10.2005, p 127), EC Council Directive 2006/97 (OJ L363, 20.12.2006, p 107), European Parliament and EC Council Directive 2009/64 (OJ L216, 20.8.2009, p 1), EC Commission Regulations 1874/2004 (OJ L326, 29.10.2004, p 17), 2083/2005 (OJ L333, 20.12.2005, p 28), 1422/2007 (OJ L317, 5.12.2007, p 34), 213/2008 (OJ L74, 15.3.2008, p 1)). Directive 2004/18 implemented by Public Contracts Regulations 2006, SI 2006/5: see PARA 23A. See Case C-448/01 *EVN AG v Austria* [2004] 1 CMLR 739, ECJ; Case C-226/04 *La Cascina Soc Coop arl v Ministero della Difesa*; Case C-228/04 *Consorzio GFM v Ministero della Difesa* [2006] 2 CMLR 1029, ECJ; Case C-340/04 *Carbotermo SpA v Comune di Busto Arsizio* [2006] 3 CMLR 195, ECJ; Case C-220/05 *Auroux v Commune de Roanne (Société d'Équipement du Département de la Loire (SEDL), intervening)* [2007] All ER (EC) 918, ECJ; Case C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2008] ICR 145, ECJ; and Case C-300/07 *Hans & Christophorus Oymanns GbR, Orthopadie Schuhtechnik v AOK Rheinland/Hamburg* [2009] All ER (D) 105 (Sep), ECJ.

NOTE 2--SI 1991/2680 further amended: SI 2003/46.

EEC Council Directive 93/38 replaced: European Parliament and EC Council Directive 2004/17 (OJ L134 20.4.2004 p 1) (amended by European Parliament and EC Council Directive 2009/64 (OJ L216, 20.8.2009, p 1)). SI 1996/2911 replaced by Utilities Contracts Regulations 2006, SI 2006/6 (amended by SI 2007/2157, SI 2007/3542, SI 2008/2256, SI 2008/2848), which implements Directive 2004/17).

NOTE 4--Now head (9) a fire and rescue authority constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies: SI 1991/2680 reg 3(1) (amended by SI 2004/3168 (England), SI 2005/2929 (Wales)).

NOTE 6--See Case C-324/07 *Coditel Brabant SA v Commune D'Uccle, Region de Bruxelles-Capitale (Societe Intercommunale Pour la Diffusion de la Television (Brutele) intervening)* [2009] 1 CMLR 789, ECJ.

NOTE 12--See Case C-513/99 *Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v Helsingin kaupunki* [2004] All ER (EC) 87, ECJ (consideration of environmental criteria not contrary to principle of equal treatment where only limited number of undertakings satisfied them).

NOTE 13--SI 1996/2911 amended: SI 2003/46.

NOTE 19--SI 1991/2680 regs 25, 26 amended, Sch 2 revoked: SI 2003/46.

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23A. Public contracts.

1. Application

The following provisions apply whenever a contracting authority¹ seeks offers in relation to a proposed public supply contract², public works contract³, Part A services contract⁴, framework agreement⁵ or dynamic purchasing system⁶ other than a contract, framework agreement or dynamic purchasing system excluded from the application of the provisions⁷. Where the provisions apply, a contracting authority (1) must not treat a person who is not a national of a relevant state⁸ and established in a relevant state more favourably than one who is⁹; (2) must treat economic operators¹⁰ equally and in a non-discriminatory way; and (3) must act in a transparent way¹¹. The provisions have only partial application where a contracting authority seeks offers in relation to a proposed Part B services agreement¹² other than an excluded one¹³.

1 For these purposes, each of the following is a contracting authority: (1) a minister of the Crown; (2) a government department; (3) the House of Commons; (4) the House of Lords; (5) the Northern Ireland Assembly Commission; (6) the Scottish Ministers; (7) the Scottish Parliamentary Corporate Body; (8) the National Assembly for Wales; (9) a local authority; (10) a fire authority constituted by a combination scheme under the Fire Services Act 1947; (11) a fire and rescue authority (a) within the meaning of the Fire and Rescue Services Act 2004 s 1; (b) constituted by a scheme under s 2; or (c) constituted by a scheme to which s 4 applies; (12) the Fire Authority for Northern Ireland; (13) a police authority established under the Police Act 1996 s 3; (14) the Metropolitan Police Authority established under s 5B; (15) a police authority established under the Police (Scotland) Act 1967 s 2; (16) the Northern Ireland Policing Board; (17) an authority established under the Local Government Act 1985 s 10; (18) a joint authority established by Pt IV (ss 23-42); (19) any body established in accordance with an order under s 67: Public Contracts Regulations 2006, SI 2006/5, reg 3(1). 'Local authority' means, in relation to England, a county council, a district council, a London borough council, a parish council, the Council of the Isles of Scilly, the Common Council of the City of London in its capacity as local authority or police authority, or the Greater London Authority or a functional body within the meaning of the Greater London Authority Act 1999 (SI 2006/5 reg 3(2)), and, in relation to Wales, a county council, a county borough council or a community council (reg 3(3)). Where an entity specified in reg 3(1) does not have the capacity to enter into a contract, the contracting authority in relation to that entity is a person whose function it is to enter into contracts for that entity: reg 3(6).

2 'Public supply contract' means a contract, in writing, for consideration (whatever the nature of the consideration) (1) for the purchase of goods by a contracting authority (irrespective of whether the consideration is given in instalments and irrespective of whether the purchase is conditional on the occurrence of a particular event); or (2) for the hire of goods by a contracting authority (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not), and for any siting or installation of those goods, but where under such a contract services are also to be provided, the contract is only a public supply contract where the value of the consideration attributable to the goods and any siting or installation of the goods is equal to or greater than the value attributable to the services: *ibid* reg 2(1). 'In writing' means any expression consisting of words or figures that can be read, reproduced and subsequently communicated and it may include information transmitted and stored by electronic means; and 'goods' includes electricity, substances, growing crops and things attached to or forming part of the land which are agreed to be severed before the purchase or hire under a public supply contract, and any ship, aircraft or vehicle: reg 2(1).

3 'Public works contract' means a contract, in writing, for consideration (whatever the nature of the consideration) (1) for the carrying out of a work or works for a contracting authority; or (2) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements: *ibid* reg 2(1).

4 'A Part A services contract' is a contract under which services specified in *ibid* Sch 3 Pt A (Sch 3 substituted by SI 2008/2256) are to be provided: SI 2006/5 reg 2(2)(a).

5 'Framework agreement' means an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies: *ibid* reg 2(1).

6 'Dynamic purchasing system' means a completely electronic system of limited duration which is (1) established by a contracting authority to purchase commonly used goods, work, works or services; and (2) open throughout its duration for the admission of economic operators which (a) satisfy the selection criteria specified by the contracting authority; and (b) submit an indicative tender to the contracting authority or person operating the system on its behalf which complies with the specification required by that contracting authority or person: *ibid* reg 2(1). 'Indicative tender' means a tender prepared by an economic operator seeking admission to a dynamic purchasing system which sets out the terms on which it would be prepared to enter into a contract with a contracting authority should that contracting authority propose to award a contract under the system: reg 2(1).

7 *Ie* by *ibid* reg 6 or 8. Regulation 6 makes some general exclusions from the application of the provisions, and reg 8 (amended by SI 2007/3542) prescribes various thresholds which must be satisfied for the provisions to have any application. A contracting authority may reserve the right to participate in a public contract award procedure, framework agreement or dynamic purchasing system to economic operators which operate supported factories, supported businesses or supported employment programmes: SI 2006/5 reg 7. As to the duty of a public body to act proportionately when awarding public contracts see *JB Leadbitter & Co Ltd v Devon CC* [2009] EWHC 930 (Ch), (2009) 124 ConLR 135.

8 'A relevant state' is a member state or a state listed in SI 2006/5 Sch 4 column 1: reg 4(4).

9 *Ibid* reg 4(2).

10 'Economic operator' means a contractor, a supplier or a services provider: *ibid* reg 4(1). 'Contractor' means a person who offers on the market work or works and (1) who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded; and (2) who is a national of and established in a relevant state; 'supplier' means a person who offers on the market goods for purchase or hire and (a) who sought, who seeks, or who would have wished, to be the person to whom a public supply contract is awarded; and (b) who is a national of and established in a relevant state; and 'services provider' means a person who offers on the market services and (i) who sought, who seeks, or who would have wished to be the person to whom a public services contract is awarded, or to participate in a design contest; and (ii) who is a national of and established in a relevant state: reg 2(1). 'Public services contract' means a contract, in writing, for consideration (whatever the nature of the consideration) under which a contracting authority engages a person to provide services but does not include a public works contract or a public supply contract; and a contract for both goods and services is to be considered to be a public services contract if the value of the consideration attributable to those services exceeds that of the goods covered by the contract and a contract for services which includes activities specified in Sch 2 (Sch 2 substituted by SI 2008/2256) that are only incidental to the principal object of the contract is to be considered to be a public services contract: SI 2006/5 reg 2(1).

11 *Ibid* reg 4(3).

12 'A Part B services contract' is a contract under which services specified in *ibid* Sch 3 Pt B (as substituted: see NOTE 5) are to be provided: *ibid* reg 2(2)(b). Where services specified in both Sch 3 Parts A and B are to be provided under a single contract, then the contract is to be treated as (1) a Part A services contract if the value of the consideration attributable to the services specified in Part A is greater than that attributable to those specified in Part B; and (2) a Part B services contract if the value of the consideration attributable to the services specified in Part B is equal to or greater than that attributable to those specified in Part A: reg 2(3).

13 *Ie* excluded by *ibid* reg 6 or 8: reg 5(2) (amended by SI 2007/3542).

2. Technical specifications and variants

Where a contracting authority¹ wishes to lay down technical specifications which must be met by (1) the services to be provided under a public services contract² and the materials and goods used in or for it; (2) the goods to be purchased or hired under a public supply contract³; or (4) the work or works to be carried out under a public works contract⁴ and the materials and goods used in or for it, it must specify those technical specifications in the contract documents⁵.

Where a contracting authority intends to award a public contract⁶ on the basis of the offer which is the most economically advantageous⁷, it must indicate in the contract notice⁸ whether

it authorises economic operators⁹ to submit offers which contain variants on the requirements specified in the contract documents and a contracting authority must not accept an offer which contains a variant without that indication¹⁰.

1 As to the meaning of 'contracting authority' see PARA 23A.1.

2 As to the meaning of 'public services contract' see PARA 23A.1.

3 As to the meaning of 'public supply contract' see PARA 23A.1.

4 As to the meaning of 'public works contract' see PARA 23A.1.

5 Public Contracts Regulations 2006, SI 2006/5, reg 9(2). See further reg 9(3)-(17).

6 'Public contract' means a public services contract, a public supply contract or a public works contract: *ibid* reg 2(1).

7 *Ie* in accordance with *ibid* reg 30(1)(a).

8 'Contract notice' means a notice sent to the Official Journal in accordance with SI 2006/5: reg 2(1).

9 As to the meaning of 'economic operator' see PARA 23A.1.

10 SI 2006/5 reg 10(1). See further reg 10(2)-(4).

3. Prior information notices

A contracting authority¹ must send a prior information notice² to the European Commission or publish it on that contracting authority's buyer profile³ as soon as possible after (1) the beginning of the financial year in the case of public supply contracts⁴ or public services contracts⁵ or framework agreements⁶ for the purchase or hire of goods or for the provision of services; or (2) the decision authorising the programme of public works contracts⁷ or framework agreements for the carrying out of work or works, in the case of public works contracts or framework agreements for the carrying out of work or works⁸. The notice must contain information in respect of (a) the public supply contracts, the public services contracts or the relevant framework agreements under head (1) above which the contracting authority expects to award or conclude during the period of 12 months beginning with the date of the notice; and (b) the public works contracts or relevant framework agreements under head (2) above which the contracting authority expects to award or conclude⁹.

1 As to the meaning of 'contracting authority' see PARA 23A.1.

2 *Ie* a notice in the form of the prior information notice in European Commission Regulation 1564/2005 Annex I and containing the information therein specified.

3 'Buyer profile' means a page on the internet set up by a contracting authority containing one or more of the following: prior information notices, information on ongoing invitations to tender, prospective and concluded contracts, cancelled procedures and useful general information, such as a contact point, a telephone number, a facsimile number, a postal address or an e-mail address: Public Contracts Regulations 2006, SI 2006/5, reg 2(1).

4 As to the meaning of 'public supply contract' see PARA 23A.1.

5 As to the meaning of 'public services contract' see PARA 23A.1.

6 As to the meaning of 'framework agreement' see PARAA 23A.1.

7 As to the meaning of 'public works contract' see PARA 23A.1.

8 SI 2006/5 reg 11(1).

9 *Ibid* reg 11(2). See further reg 11(3)-(6) (amended by SI 2007/3542).

4. Contract award procedures

Except in the case of a subsidised housing scheme works contract¹, for the purpose of seeking offers in relation to a proposed public contract², a contracting authority³ must use the open procedure⁴ or the restricted procedure⁵ in all circumstances, except where it may use the negotiated procedure⁶ or the competitive dialogue procedure⁷.

- 1 See the Public Contracts Regulations 2006, SI 2006/5, reg 35.
- 2 As to the meaning of 'public contract' see PARA 23A.2.
- 3 As to the meaning of 'contracting authority' see PARA 23A.2.
- 4 Ie in accordance with SI 2006/5 reg 15.
- 5 Ie in accordance with ibid reg 16.
- 6 Ie in accordance with ibid reg 17.
- 7 Ibid reg 12 referring to the procedure in accordance with reg 18.

5. Framework agreements

Where a contracting authority¹ intends to conclude a framework agreement², it must follow one of the contract award procedures³ up to (but not including) the beginning of the procedure for the award of any specific contract⁴, and select an economic operator⁵ to be party to a framework agreement by applying relevant award criteria⁶. Where the contracting authority awards a specific contract based on a framework agreement, it must comply with the following procedures and apply those procedures only to the economic operators which are party to the framework agreement⁷. When awarding a specific contract on the basis of a framework agreement, neither the contracting authority nor the economic operator is to include in that contract terms that are substantially amended from the terms laid down in that framework agreement⁸. Where the contracting authority concludes a framework agreement with one economic operator, it must award any specific contract within the limits of the terms laid down in the framework agreement, and in order to award a specific contract, the contracting authority may consult in writing the economic operator which is party to the framework agreement requesting that economic operator to supplement its tender if necessary⁹. Where the contracting authority concludes a framework agreement with more than one economic operator, the minimum number of economic operators is three, in so far as there is a sufficient number of economic operators to satisfy the selection criteria or admissible tenders which meet the award criteria¹⁰. Where the contracting authority concludes a framework agreement with more than one economic operator, a specific contract may be awarded by application of the terms laid down in the framework agreement without re-opening competition, or, where not all the terms of the proposed contract are laid down in the framework agreement, by re-opening competition between the economic operators which are parties to that framework agreement and which are capable of performing the proposed contract¹¹. If the latter, the competition must be re-opened on the basis of the same or, if necessary, more precisely formulated terms, and where appropriate other terms referred to in the contract documents based on the framework agreement¹². Where competition is re-opened, for each specific contract to be awarded it must (1) consult in writing the economic operators capable of performing the contract and invite them within a specified time limit to submit a tender in writing for each specific contract to be awarded; (2) set a time limit for the receipt by it of the tenders which takes into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders; (3) keep each tender confidential until the expiry of the time limit for the receipt by it of tenders; and (4) award each contract to the

economic operator which has submitted the best tender on the basis of the award criteria specified in the contract documents based on the framework agreement¹³. The contracting authority must not conclude a framework agreement for a period which exceeds four years except in exceptional circumstances, in particular, circumstances relating to the subject of the framework agreement¹⁴. The contracting authority must not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition¹⁵.

1 As to the meaning of 'contracting authority' see PARA 23A.1.

2 As to the meaning of 'framework agreement' see PARA 23A.1.

3 See PARA 23A.4.

4 'Specific contract' means a contract based on the terms of a framework agreement: Public Contracts Regulations 2006, SI 2006/5, reg 19(11).

5 As to the meaning of 'economic operator' see PARA 23A.1.

6 SI 2006/5 reg 19(2), referring to criteria set in accordance with SI 2006/5.

7 Ibid reg 19(3).

8 Ibid reg 19(4).

9 Ibid reg 19(5).

10 Ibid reg 19(6).

11 Ibid reg 19(7).

12 Ibid reg 19(8).

13 Ibid reg 19(9).

14 Ibid reg 19(10).

15 Ibid reg 19(12).

6. Dynamic purchasing systems

A contracting authority¹ which seeks to establish a dynamic purchasing system² must comply with the following requirements and must use only electronic means³ to establish that system and award contracts under it⁴. The contracting authority must use the open procedure⁵ to establish a dynamic purchasing system up to the beginning of the procedure for the award of contracts under the system⁵. When establishing a dynamic purchasing system, the contracting authority must (1) send to the Official Journal of the European Union a contract notice⁶ as soon as possible after forming the intention a notice, stating that a dynamic purchasing system is to be established; and (2) produce a specification which indicates the nature of the goods, work, works or services intended to be purchased under that system, and information concerning the purchasing system, the electronic equipment to be used in its operation, the arrangements for technical connection to the system, the rules governing its operation and any other necessary information relating to the system⁷. When establishing a dynamic purchasing system the contracting authority may also produce additional documents relating to the operation of the system⁸. Where the contracting authority establishes a dynamic purchasing system it must offer unrestricted, direct and full access to the specification and to any additional documents by electronic means from the date of publication of the contract notice to the date when the system ceases to be operated, and indicate in the contract notice the internet address at which those documents may be examined⁹. Throughout the duration of the dynamic purchasing system, the contracting authority must give any economic operator¹⁰ the opportunity to submit

an indicative tender and be admitted to that system under specified conditions, and complete the evaluation of an indicative tender within 15 days from the date of its submission or such longer period as the contracting authority may determine if no invitation to tender is issued under the system within the 15 day period¹¹. The contracting authority must admit to the dynamic purchasing system each economic operator which satisfies the selection criteria and has submitted an indicative tender which complies with the specification and any additional documents produced by the contracting authority when establishing the system¹². The contracting authority must as soon as possible notify an economic operator of its admission to a dynamic purchasing system or of the rejection of its indicative tender and must do so in writing if requested by the economic operator¹³. An economic operator which is admitted to a dynamic purchasing system may improve its indicative tender at any time provided that the improved tender complies with the specification¹⁴. Where the contracting authority proposes to award a contract under a dynamic purchasing system, it must send to the Official Journal as soon as possible after forming the intention a simplified contract notice on a dynamic purchasing system, inviting economic operators to submit an indicative tender not less than 15 days from the date of the despatch of the simplified contract notice¹⁵. The indicative tenders received within the specified period must be evaluated by the contracting authority for admittance to the dynamic purchasing system before it proceeds with the issue of invitations to submit tenders in relation to any contract to be awarded under the dynamic purchasing system to an economic operator admitted to the system¹⁶. The contracting authority must invite all economic operators admitted to the dynamic purchasing system to submit a tender for each contract within a time limit specified by the contracting authority¹⁷. For each contract to be awarded under the dynamic purchasing system, the contracting authority must award the contract to the economic operator which submits the tender which best meets the award criteria specified in the contract notice for the establishment of the dynamic purchasing system, and may, if appropriate, formulate those award criteria more precisely in the invitation to submit tenders¹⁸. The contracting authority must not charge any economic operator seeking admission to a dynamic purchasing system or which has been admitted to such a system in relation to any aspect of that system¹⁹. A dynamic purchasing system established by the contracting authority must not be operated for more than four years, unless there are exceptional circumstances²⁰. The contracting authority must not use a dynamic purchasing system improperly or in such a way as to prevent, restrict or distort competition²¹.

1 As to the meaning of 'contracting authority' see PARA 23A.1.

2 As to the meaning of 'dynamic purchasing system' see PARA 23A.1.

3 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means: Public Contracts Regulations 2006, SI 2006/5, reg 2(1).

4 Ibid reg 20(2).

5 Ibid reg 20(3).

6 I.e a notice in the form of the contract notice in EC Commission Regulation 1564/2005 Annex II.

7 SI 2006/5 reg 20(4).

8 Ibid reg 20(5).

9 Ibid reg 20(6).

10 As to the meaning of 'economic operator' see PARA 23A.1.

11 SI 2006/5 reg 20(7).

12 Ibid reg 20(8).

- 13 Ibid reg 20(9) (amended by SI 2009/2992).
- 14 SI 2006/5 reg 20(10).
- 15 Ibid reg 20(11).
- 16 Ibid reg 20(12).
- 17 Ibid reg 20(13).
- 18 Ibid reg 20(14).
- 19 Ibid reg 20(15).
- 20 Ibid reg 20(16).
- 21 Ibid reg 20(17).

7. Electronic auctions

A contracting authority¹ may hold an electronic auction² when using the open procedure, the restricted procedure, the negotiated procedure in certain specified circumstances³, the procedure on the re-opening of competition among the parties to a framework agreement⁴, or the procedure on the opening of competition for contracts to be awarded under a dynamic purchasing system⁵. The contracting authority must not hold an electronic auction to precede the award of a public services contract⁶ or a public works contract⁷ having as its subject matter intellectual performance, such as the design of works⁸. The contracting authority may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision⁹. The contracting authority must base an electronic auction on price alone where the contract is to be awarded on the basis of the lowest price, or price or the values of quantifiable elements of tenders indicated in the contract specification, where the contract is to be awarded on the basis of the offer which is the most economically advantageous¹⁰. Where the contracting authority intends to hold an electronic auction it must state this in the contract notice¹¹. A contract specification prepared by the contracting authority in relation to a contract the award of which is to be preceded by an electronic auction must include (1) the quantifiable elements of tenders capable of expression in figures or percentages which will be the subject of the electronic auction; (2) any limitations on the values for the quantifiable elements of tenders (resulting from the contract specification) which may be submitted in the electronic auction; (3) the information to be made available to economic operators¹² during the electronic auction and, where appropriate, an indication of when it will be made available to them; (4) a description of the electronic auction process; (5) the conditions under which the economic operators will be able to bid and, in particular, the minimum differences which may be required when bidding; and (6) all relevant information concerning the electronic system to be used in the electronic auction and the arrangements for and technical specifications relevant to connection to the electronic system to be used¹³. Before proceeding with an electronic auction, the contracting authority must make an initial evaluation of the tenders in accordance with the award criteria specified and with any weighting fixed for them, and by electronic means simultaneously invite all the economic operators which have submitted admissible tenders to submit new prices or new values in the electronic auction¹⁴. Where the contracting authority is to award a contract on the basis of the offer which is the most economically advantageous to it, each invitation must include the outcome of the evaluation of the tender submitted by the economic operator to which the invitation is sent¹⁵. The contracting authority must include in the invitation (a) all relevant information concerning individual connection to the electronic system to be used in the electronic auction; (b) the date and time of the start of the electronic auction; (c) the number of phases in the electronic auction; (d) the mathematical formula to be used in the electronic auction to determine automatic re-ranking of tenders on the basis of the new prices or new values submitted by economic operators and incorporating the weighting of all the criteria set to determine the

most economically advantageous tender; (e) where variant bids are authorised by the contracting authority, a separate mathematical formula for each variation; and (f) the basis on which the electronic auction is to be closed and the appropriate additional information¹⁶.

1 As to the meaning of 'contracting authority' see PARA 23A.1.

2 'Electronic auction' means a repetitive electronic process for the presentation of prices to be revised downwards or of new and improved values of quantifiable elements of tenders, including price, which takes place after the initial evaluation of tenders and enables tenders to be ranked using automatic evaluation methods: Public Contracts Regulations 2006, SI 2006/5.

3 See PARA 23A.4.

4 I.e. the procedure set out in SI 2006/5 reg 19(7) (see PARA 23A.5). As to the meaning of 'framework agreement' see PARA 23A.1.

5 Ibid reg 21(2), (3), referring to the procedure set out in reg 20 (see PARA 23A.6). As to the meaning of 'dynamic purchasing system' see PARA 20A.1.

6 As to the meaning of 'public services contract' see PARA 20A.1.

7 As to the meaning of 'public works contract' see PARA 20A.1.

8 SI 2006/5 reg 21(3).

9 Ibid reg 21(4).

10 Ibid reg 21(5).

11 Ibid reg 21(6). As to the meaning of 'contract notice' see PARA 23A.2.

12 As to the meaning of 'economic operator' see PARA 23A.1.

13 Ibid reg 21(7).

14 Ibid reg 21(8).

15 Ibid reg 21(9).

16 Ibid reg 21(10). See further reg 21(11)-(19).

8. Central purchasing bodies

A contracting authority¹ may purchase work, works, goods or services from or through a central purchasing body². Where a contracting authority makes such purchases, it must be deemed to have complied with the public contracts requirements³ to the extent that the central purchasing body has complied with them⁴.

1 As to the meaning of 'contracting authority' see PARA 23A.1.

2 Public Contracts Regulations 2006, SI 2006/5, reg 22(1). 'Central purchasing body' means a contracting authority which (1) acquires goods or services intended for one or more contracting authorities; (2) awards public contracts intended for one or more contracting authorities; or (3) concludes framework agreements for work, works, goods or services intended for one or more contracting authorities: reg 2(1). As to the meaning of 'public contract' see PARA 23A.2; and as to the meaning of 'framework agreement' see PARA 23A.1.

3 I.e. the requirements of SI 2006/5.

4 Ibid reg 22(2).

9. Supplementary provisions

Supplementary provision is made in relation to the selection of economic operators¹, the award of public contracts², specialised contracts³, miscellaneous matters relating to public contracts⁴ and applications to the court⁵.

1 See the Public Contracts Regulations 2006, SI 2006/5, regs 23-29A, Sch 6 (reg 23 amended by SI 2007/3542, SI 2007/2157; SI 2006/5 reg 29A added by SI 2009/2992; SI 2006/5 Sch 6 substituted by SI 2007/3542).

2 See SI 2006/5 regs 30-32A (reg 31 amended by SI 2007/3542, SI 2009/2992; SI 2006/5 reg 32 amended, reg 32A added, by SI 2009/2992). See also *Risk Management Partners Ltd v Brent LBC* [2008] EWHC 1094 (Admin), [2008] LGR 429. A contracting authority is at liberty, during the ten-day standstill period provided by SI 2006/5 reg 32(3), or an extension of the same, to re-open the contract assessment and award the contract afresh when it is satisfied that it is right to do so because the initial decision to award the contract to one economic operator is grounded on illegality, bad faith or material unfairness or misinterpretation: *McConnell Archive Storage Ltd v Belfast City Council* [2008] NICh 3.

3 See SI 2006/5 regs 33-37 (amended by SI 2007/3542).

4 See SI 2006/5 regs 38-46.

5 See *ibid* regs 47-47P (substituted by SI 2009/2992). Time starts to run for bringing proceedings concerning an alleged infringement of the public procurement rules on the date on which the claimant knew, or ought to have known, of that infringement: C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] All ER (D) 13 (Feb), ECJ. As to the continuation of an interim injunction granted to an unsuccessful bidder to prevent signature of contracts with preferred bidders see *European Dynamics SA v HM Treasury* [2009] EWHC 3419 (TCC), (2009) 128 ConLR 36.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(3) AGREEMENT, CONSIDERATION AND FACTORS VITIATING AGREEMENT/(iii) Public Works Contracts/24. Public works contracts subject to special tendering procedures.

24. Public works contracts subject to special tendering procedures.

A contracting authority¹ intending to seek offers in relation to a public works contract² must, as soon as possible after the decision approving the planning of the work or works³, send to the Official Journal of the European Communities a notice⁴ containing specified information in relation to the contract⁵. For the purpose of seeking offers in relation to a proposed public works contract, a contracting authority must use either the open procedure, the restricted procedure or the negotiated procedure⁶. The 'open procedure' means a procedure leading to the award⁷ of a public works contract whereby all interested persons may tender for the contract⁸. The 'restricted procedure' means a procedure leading to the award of a public works contract whereby only persons selected by the contracting authority may submit tenders for the contract⁹. The 'negotiated procedure' means a procedure leading to the award of a public works contract whereby the contracting authority negotiates the terms of the contract with one or more persons selected by it¹⁰.

The contracting authority may use the negotiated procedure in the following circumstances:

- 23 (1) in the event that the procedure leading to the award of a public works contract by the contracting authority using the open or restricted procedure was discontinued (a) because of irregular tenders; or (b) following an evaluation of contractors¹¹ and without prejudice to the generality of the meaning of the words 'irregular tenders' a tender may be considered irregular if the contractor fails to meet the requirements of, or the tender offers variations on the requirements specified in, the contract documents¹² where this is not permitted under the terms of the invitation to tender, or the work, works, materials or goods offered do not meet the technical specifications¹³;
- 24 (2) when the work or works are to be carried out under the contract purely for the purpose of research, experiment or development but not where the works are to be carried out to establish commercial viability or to recover research and development costs¹⁴;
- 25 (3) exceptionally, when the nature of the work or works to be carried out under the contract is such, or the risks attaching to it are such, as not to permit prior overall pricing¹⁵;
- 26 (4) in the absence of tenders or of appropriate tenders in response to an invitation to tender by the contracting authority using the open or restricted procedure¹⁶;
- 27 (5) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the work or works to be carried out under the contract may only be carried out by a particular person¹⁷;
- 28 (6) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the specified¹⁸ time limits cannot be met¹⁹;
- 29 (7) when a contracting authority wants a person who has entered into a public works contract with the contracting authority to carry out additional works which through unforeseen circumstances were not included in the project initially considered or in the original public works contract and²⁰: (a) such works cannot for technical or economic reasons be carried out separately from the works carried out

- under the original public works contract without great inconvenience to the contracting authority²¹; or (b) such works can be carried out separately from the works carried out under the original public works contract but are strictly necessary to the later stages of that contract²²; and
- 30 (8) when a contracting authority wishes a person who has entered into a public works contract with that contracting authority to carry out new works which are a repetition of works carried out under the original contract and which are in accordance with the project for the purpose of which the first contract was entered into²³.

In all other circumstances, the contracting authority must use the open or the restricted procedure²⁴.

If a contracting authority wishes to lay down technical specifications²⁵ which the work or works to be carried out under a public works contract and which the materials and goods used in or for it or them must meet, it must specify all such technical specifications in the contract documents²⁶.

Where a contracting authority includes in the contract documents relating to a public works contract information as to where a contractor may obtain information about obligations relating to employment protection and working conditions which will apply to the works to be carried out under the contract, it must request contractors to indicate that they have taken account of those obligations in preparing their tender or in negotiating the contract²⁷.

1 For the meaning of 'contracting authority' see para 23 note 4 ante.

2 For the meaning of 'public works contract' see para 23 ante.

3 For the meanings of 'work' and 'works' see para 23 note 6 ante.

4 For the form of notice see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 9, Sch 2 Pt A (substituted by SI 2000/2009). As to the publication of notices see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 30.

5 Ibid reg 9.

6 See ibid reg 10(1). A contracting authority must decide which of those procedures to use in accordance with reg 10: reg 10(1). Special provision is made in the case of a public housing scheme works contracts, which are public works contracts relating to the design and construction of a public housing scheme: see regs 2(1), 24.

7 'To award' means to accept an offer made in relation to a proposed contract: ibid reg 2(1).

8 Ibid reg 2(1). A contracting authority using the open procedure must comply with the requirements set out in the regulations: see reg 11(1). It must publicise its intention to seek offers under this procedure using the specified form (see Sch 2 Pt B (substituted by SI 2000/2009)) inviting requests to be selected to tender and containing specified information, and send it to the Official Journal of the European Communities: Public Works Contracts Regulations 1991, SI 1991/2680, reg 11(2). Provision is made as to the time limits which may be fixed for the receipt of tenders (see reg 11(3), (4) (reg 11(4) substituted by SI 2000/2009)), and for sending contract documents (see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 11(5)). A contracting authority must supply further information relating to the contract documents as may be reasonably requested: see reg 11(6). Provision is made as to the exclusion of certain contractors, and the necessity for the contracting authority to make an evaluation of contractors (see reg 11(7)) and as to the means of submission of tenders (see reg 11(8), (9) (added by SI 2000/2009)). For the meaning of 'contractor' see para 23 ante. As to the selection of contractors see para 25 post.

9 Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1). A contracting authority using the restricted procedure must comply with the requirements set out in the regulations: see reg 12(1). It must publicise its intention to seek offers under this procedure using the specified form (see Sch 2 Pt C (substituted by SI 2000/2009)) and send it to the Official Journal of the European Communities: Public Works Contracts Regulations 1991, SI 1991/2680, reg 12(2). Provision is made as to the exclusion of certain contractors, and the necessity for the contracting authority to make an evaluation of contractors (see reg 12(4) (amended by SI

2000/2009)), the selection, range and number of persons invited to tender (see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 12(5), (6), (7) (reg 12(5) amended by SI 2000/2009)), and the invitations to tender (see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 12(8), (9), (10)). Provision is also made as to the time limits which may be fixed for the receipt of requests to be selected to tender (see reg 12(3)) and those fixed in relation to receipt of the tenders made in response to the invitation (see reg 12(11), (12) (reg 12(12) substituted by SI 2000/2009)), but these limits may be varied where compliance is rendered impracticable for reasons of urgency (see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 12(14)). A contracting authority must supply further information relating to the contract documents as may be reasonably requested: see reg 12(13). Provision is made as to applications for an invitation to tender made by letter, telegram, telex, facsimile or telephone (see reg 12(15)), and as to the means of submission of tender (see reg 12(16), (17) (added by SI 2000/2009)).

10 Public Works Contracts Regulations 1991, SI 1991/2680, reg 2(1). A contracting authority using the negotiated procedure must comply with the requirements set out in the regulations, but, in certain circumstances, some are exempt from the requirements: see reg 13(1) (amended by SI 1992/3279). The contracting authority must publicise its intention to seek offers under the negotiated procedure using the specified form (see the Public Works Contracts Regulations 1991, SI 1991/2680, Sch 2 Pt D (substituted by SI 2000/2009)) inviting requests to be selected to negotiate and containing specified information, and send it to the Official Journal of the European Communities: Public Works Contracts Regulations 1991, SI 1991/2680, reg 13(2) (amended by SI 1992/3279). Provision is made as to the time limits which may be fixed for the receipt of requests to be selected to negotiate: see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 13(3), (4). Applications for selection to negotiate may be made by letter, telegram, telex, facsimile or telephone: see reg 13(6). Provision is also made as to the exclusion of certain contractors, and the necessity for the contracting authority to make an evaluation of contractors (see reg 13(7)), and the number and selection of persons invited to negotiate (see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 13(5), (8) (reg 13(8) amended by SI 1995/201)).

11 *Ie* made in accordance with the Public Works Contracts Regulations 1991, SI 1991/2680, reg 11(7) or reg 12(4) (as amended): see notes 8-9 *supra*.

12 'Contract documents' means the invitation to tender for or to negotiate the contract, the proposed conditions of contract, the specifications or description of the work or works required by the contracting authority and of the materials or goods to be used in or for it or them, and all documents supplementary thereto: *ibid* reg 2(1).

13 See *ibid* reg 10(2)(a) (amended by SI 1992/3279). For the meaning of 'technical specifications' see note 25 *infra*. A contracting authority must not use the negotiated procedure pursuant to the Public Works Contracts Regulations 1991, SI 1991/2680, reg 10(2)(a) or reg 10(2)(d) unless the proposed terms of the contract are substantially unaltered from the proposed terms of the contract in relation to which offers were sought using the open or restricted procedure: reg 10(3).

14 *Ibid* reg 10(2)(b).

15 *Ibid* reg 10(2)(c).

16 *Ibid* reg 10(2)(d). See also note 13 *supra*. A contracting authority using the negotiated procedure under reg 10(2)(d) must, if the EC Commission requests it, submit a report recording the fact that it has done so to the Treasury for onward transmission to the Commission: reg 10(7). Where a contracting authority is not a Minister of the Crown or a government department, that contracting authority must send any such report which it is required to send to the Treasury instead to the minister responsible for that contracting authority and that minister is responsible for sending the report to the Treasury: see reg 29(1). As to the responsibility for obtaining such reports see reg 29 (amended by SI 1999/1820). For the meaning of 'Minister of the Crown' see para 23 note 4 *ante*. As to the meaning of 'government department' see para 23 note 4 *ante*. As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 512-517.

17 Public Works Contracts Regulations 1991, SI 1991/2680, reg 10(2)(e).

18 *Ie* the time limits specified in *ibid* regs 11, 12 and 13 (all as amended) (see notes 8-10 *supra*) if the open or restricted procedures or the negotiated procedure pursuant to reg 10(2)(a) to (c) (see the text and notes 13-15 *supra*) are used: see reg 10(2)(f).

19 *Ibid* reg 10(2)(f).

20 *Ibid* reg 10(2)(g). A contracting authority must not use the negotiated procedure pursuant to reg 10(2)(g) where the aggregate value of the consideration to be given under contracts for the additional works exceeds 50% of the value of the consideration payable under the original contract; and, for these purposes, the value of the consideration is to be taken to include the estimated value of any goods which the contracting authority provided to the person awarded the contract for the purpose of carrying out the contract: reg 10(4).

21 Ibid reg 10(2)(g)(i).

22 Ibid reg 10(2)(g)(ii).

23 Ibid reg 10(2)(h). A contracting authority must not use the negotiated procedure pursuant to reg 10(2)(h) unless the contract notice relating to the original contract stated that a public works contract for new works which would be a repetition of the works carried out under the original contract may be awarded using the negotiated procedure pursuant to reg 10(2)(h) and unless the procedure for the award of the new contract is commenced within three years of the original contract being entered into: reg 10(5).

24 Ibid reg 10(6).

25 'Technical specifications' means the technical requirements defining the characteristics required of the work or works and of the materials and goods used in or for it or them (such as quality, performance, safety or dimensions) so that the works, work, materials and goods are described objectively in a manner which will ensure that they fulfil the use for which they are intended by the contracting authority: ibid reg 8(1). In relation to materials and goods, 'technical specifications' include requirements in respect of quality assurance, terminology, symbols, tests and testing methods, packaging, marking and labelling, and in relation to a work or works, they include requirements relating to design and costing, the testing, inspection and acceptance of a work or works, and the methods or techniques of construction: reg 8(1).

26 See ibid reg 8(2). The technical specifications in the contract documents relating to a public works contract are generally defined by reference to any European specifications which are relevant, although a contracting authority may define the technical specifications other than by reference to relevant European specifications in certain circumstances: see reg 8(3), (4), (5), (6) (7) (reg 8(6) amended by SI 1995/201). The contract documents relating to a public works contract must not include technical specifications which refer to materials or goods of a specific make or source or to a particular process and which have the effect of favouring or eliminating particular contractors, nor may references to trademarks, patents, types, origin or means of production be incorporated into the technical specifications in the contract documents (see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 8(8), (9)), although there are contracting authorities which may incorporate such references in certain circumstances (see reg 8(10)).

27 Ibid reg 27.

UPDATE

24 Public works contracts subject to special tendering procedures

TEXT AND NOTES 1-5--SI 1991/2680 reg 9 amended, Sch 2 revoked: SI 2003/46.

NOTE 8--SI 1991/2680 reg 11(2), (4) amended, Sch 2 revoked: SI 2003/46.

NOTE 9--SI 1991/2680 reg 12(2), (12) amended, Sch 2 revoked: SI 2003/46.

NOTE 10--SI 1991/2680 reg 13(2), Sch 2 revoked: SI 2003/46.

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25. Selection of contractors.

A contracting authority¹ may treat a contractor² as ineligible to tender for, or to be included amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public works contract³, or it may decide not to select a contractor to tender for or to negotiate a public works contract⁴ on one of the following grounds, namely that the contractor:

- 31 (1) being an individual, is bankrupt or has had a receiving order or administration order made against him or has made any composition or arrangement with or for the benefit of his creditors or has made any conveyance or assignment for the benefit of his creditors or appears unable to pay, or to have no reasonable prospect of being able to pay, a debt⁵;
- 32 (2) being a partnership, constituted under Scots law has granted a trust deed or become otherwise apparently insolvent, or is the subject of a petition presented for sequestration of its estate⁶;
- 33 (3) being a company, has passed a resolution or is the subject of an order by the court for the company's winding up otherwise than for the purposes of bona fide reconstruction or amalgamation, or has had a receiver, manager or administrator on behalf of a creditor appointed in respect of the company's business or any part of it or is the subject of proceedings for any of those procedures or is the subject of similar procedures under the law of any other state⁷;
- 34 (4) has been convicted of a criminal offence relating to the conduct of his business or profession⁸;
- 35 (5) has committed an act of grave misconduct in the course of his business or profession⁹;
- 36 (6) has not fulfilled obligations relating to the payment of social security contributions under the law of any part of the United Kingdom¹⁰ or of the relevant state¹¹ in which the contractor is established¹²;
- 37 (7) has not fulfilled obligations relating to the payment of taxes under the law of any part of the United Kingdom¹³;
- 38 (8) is guilty of serious misrepresentation in providing any information required of him¹⁴ in relation to public works contracts¹⁵; or
- 39 (9) is not registered on the professional or trade register of the relevant state in which the contractor is established under the conditions laid down by that state¹⁶.

A contracting authority may require a contractor to provide such information as it considers it needs to make the evaluation as to eligibility, but may accept specified documents as conclusive evidence that a contractor does not fall within certain grounds¹⁷.

A contracting authority may also exclude a contractor if he fails to satisfy the minimum standards of economic and financial standing and technical capacity required of contractors by the contracting authority¹⁸. In assessing whether a contractor meets any such minimum standards, and selecting the contractors to be invited to tender for or to negotiate the contract¹⁹, a contracting authority must only take into account certain information, and it may require a contractor to provide such of that information as it considers it needs to make the assessment or selection²⁰.

Where contractors who are registered on the official list of recognised contractors in a relevant state submit to the contracting authority a certificate of registration, special provision is made as to the evidence or information the contracting authority is entitled to ask the contractors to provide for the purposes of the provisions described above²¹.

A contracting authority must not treat the tender of a consortium²² as ineligible nor decide not to include a consortium amongst those persons from whom it will make the selection of persons to be invited to tender for or to negotiate a public works contract on the grounds that the consortium has not formed a legal entity for the purposes of tendering for or negotiating the contract²³. However, where a contracting authority awards a public works contract to a consortium it may require the consortium to form a legal entity before entering into, or as a term of, the contract²⁴.

1 For the meaning of 'contracting authority' see para 23 note 4 ante.

2 For the meaning of 'contractor' see para 23 ante.

3 *Ie* in accordance with the Public Works Contracts Regulations 1991, SI 1991/2680, regs 11(7), 12(4) (as amended), 13(7): see para 24 notes 8-10 ante. For the meaning of 'public works contract' see para 23 ante.

4 *Ie* in accordance with *ibid* regs 12(5), 13(8) (both as amended): see para 24 notes 9-10 ante.

5 *Ibid* reg 14(1)(a). The reference to being unable to pay a debt is a reference to inability to pay within the meaning of the Insolvency Act 1968 s 268 (see *BANKRUPTCY AND INDIVIDUAL INSOLVENCY* vol 3(2) (2002 Reissue) para 127): see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 14(1)(a).

6 *Ibid* reg 14(1)(b).

7 *Ibid* reg 14(1)(c). As to corporate insolvency see *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(3) (2004 Reissue) para 1 *et seq*.

8 *Ibid* reg 14(1)(d).

9 *Ibid* reg 14(1)(e).

10 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further *CONSTITUTIONAL LAW AND HUMAN RIGHTS* vol 8(2) (Reissue) para 3. For the meanings of 'England' and 'Wales' see para 10 note 6 ante.

11 For the meaning of 'relevant state' see para 23 note 11 ante.

12 Public Works Contracts Regulations 1991, SI 1991/2680, reg 14(1)(f) (amended by SI 1995/201). As to social security contributions see *SOCIAL SECURITY AND PENSIONS* vol 44(2) (Reissue) para 31 *et seq*.

13 Public Works Contracts Regulations 1991, SI 1991/2680, reg 14(1)(g).

14 *Ie* under *ibid* regs 14, 15, 16, 17 (regs 14, 15 as amended): see notes 1-13 *supra*, 15-20 *infra*.

15 *Ibid* reg 14(1)(h).

16 *Ibid* reg 14(1)(i) (amended by SI 1995/201). As to the appropriate professional or trade registers for these purposes see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 14(4) (amended by SI 1995/201). As to where contractors established in the United Kingdom, Ireland or a relevant state are to be treated as registered on a professional or trade register for these purposes see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 14(5), (6) (reg 14(6) amended by SI 1995/201).

17 Public Works Contracts Regulations 1991, SI 1991/2680, reg 14(2), (3) (amended by SI 1995/201). The contracting authority may require a contractor to provide information supplementing the information so provided or to clarify that information: see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 17.

18 See *ibid* regs 11(7), 12(4) (as amended), 13(7); and para 24 notes 8-10 ante.

19 *Ie* in accordance with *ibid* regs 12(5), 13(8) (both as amended): see para 24 notes 9-10 ante.

20 See *ibid* regs 15(1), 16(1) (reg 15(1) amended by SI 1995/201). For the information as to economic and financial standing which may be required see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 15 (amended by SI 1995/201). For the information as to technical capacity which may be required see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 16. The contracting authority may require a contractor to provide information supplementing the information so provided or to clarify that information: see reg 17.

21 See *ibid* reg 18 (amended by SI 1992/3279; SI 1995/201).

22 For these purposes, a 'consortium' means two or more persons, at least one of whom is a contractor, acting jointly for the purpose of being awarded a public works contract: Public Works Contracts Regulations 1991, SI 1991/2680, reg 19(1). For the meaning of 'to award' see para 24 note 7 *ante*.

23 *Ibid* reg 19(2). References to a contractor or to a concessionaire where the contractor or concessionaire is a consortium includes a reference to each person who is a member of that consortium: reg 19(3). 'Concessionaire' means a person who has entered into a public works concession contract with a contracting authority: reg 2(1).

24 *Ibid* reg 19(2).

UPDATE

25 Selection of contractors

NOTE 14--SI 1991/2680 reg 21 amended, Sch 2 revoked: SI 2003/46.

TEXT AND NOTE 15--SI 1991/2680 reg 22(1) amended: SI 2003/46.

NOTE 17--See also SI 1991/2680 reg 22(3A) (added by SI 2003/46).

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26. Award of public works contracts.

A contracting authority¹ must award a public works contract² on the basis of the offer³ which offers the lowest price, or is the most economically advantageous to the contracting authority⁴. The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include price, period for completion, running costs, profitability and technical merit⁵. Where a contracting authority intends to award a public works contract on the basis of the offer which is the most economically advantageous it must state the criteria on which it intends to base its decision, where possible in descending order of importance, in the contract notice or in the contract documents⁶.

Where a contracting authority awards a public works contract on the basis of the offer which is the most economically advantageous, it may take account of offers which offer variations on the requirements specified in the contract documents if the offer meets the minimum requirements of the contracting authority and it has indicated in the contract notice that offers offering variations will be considered and has stated in the contract documents the minimum requirements which the offer must meet and any specific requirements for the presentation of an offer offering variations⁷.

If an offer for a public works contract is abnormally low the contracting authority may reject that offer but only if it has requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low and has:

- 40 (1) if awarding the contract on the basis of the offer which offers the lowest price, examined the details of all the offers made, taking into account any explanation given to it of the abnormally low tender, before awarding the contract⁸;
- or
- 41 (2) if awarding the contract on the basis of the offer which is the most economically advantageous, taken any such explanation into account in assessing which is the most economically advantageous offer⁹,

and, in considering that explanation, the contracting authority may take into account explanations which justify the offer on objective grounds including the economy of the construction method, the technical solutions suggested by the contractor or the exceptionally favourable conditions available to the contractor for the carrying out of the works¹⁰ or the originality of the works proposed by the contractor¹¹.

If a contracting authority which rejects an abnormally low offer is awarding the contract on the basis of the offer which offers the lowest price, it must send a report justifying the rejection to the Treasury¹² for onward transmission to the European Commission¹³.

A contracting authority which has awarded a public works contract must, no later than 48 days after the award, send to the Official Journal of the European Communities a notice including specified information in relation to the contract¹⁴.

Where a contracting authority decides either to abandon or to recommence an award procedure in respect of which a contract notice has been published it must inform the Office for Official Publications of the European Communities and must inform promptly any contractor who submitted an offer or who applied to be included amongst the persons to be selected to

tender for, or to negotiate, the contract of the reasons for its decision, and must do so in writing if so requested¹⁵.

A contracting authority must, within 15 days of the date on which it receives a request in writing from any contractor who was unsuccessful¹⁶, inform that contractor of the reasons why he was unsuccessful and, if the contractor submitted an admissible tender, the contracting authority must inform him of the characteristics and relative advantages of the successful tender as well as the name of the person awarded the contract¹⁷.

A contracting authority must prepare a record in relation to each public works contract awarded by it containing specified information, including details in relation to the contracting authority, the work or works to be carried out under the contract, the persons whose offers were evaluated, the persons who were unsuccessful, and the person to whom the public works contract was awarded¹⁸. In relation to each public works contract awarded by it, a contracting authority must send to the Treasury statistical reports and reports containing such other information as the Treasury may require¹⁹.

1 For the meaning of 'contracting authority' see para 23 note 4 ante.

2 For the meaning of 'to award' see para 24 note 7 ante. For the meaning of 'public works contract' see para 23 ante.

3 For these purposes, 'offer' includes a bid by one part of a contracting authority to carry out work or works for another part of the contracting authority when the former part is invited by the latter part to compete with the offers sought from other persons: Public Works Contracts Regulations 1991, SI 1991/2680, reg 20(8). For the meanings of 'work' and 'works' see para 23 note 6 ante.

4 Ibid reg 20(1). Where all the tenders are equal and the only relevant factor is cost, an adjudicating authority is permitted to award the contract to the tender which offers the best overall value for money, even if that is not necessarily the lowest: see Case C-19/00 *SIAC Construction Ltd v Mayo County Council* [2002] All ER (EC) 272, ECJ.

5 Public Works Contracts Regulations 1991, SI 1991/2680, reg 20(2).

6 Ibid reg 20(3). For the meaning of 'contract documents' see para 24 note 12 ante.

7 Ibid reg 20(4). A contracting authority may not reject a tender on the ground that the technical specifications in the tender have been defined by reference to European specifications or to the national technical specifications: see reg 20(5).

8 Ibid reg 20(6)(a).

9 Ibid reg 20(6)(b).

10 For the meaning of 'carrying out' in relation to works see para 23 note 7 ante.

11 Public Works Contracts Regulations 1991, SI 1991/2680, reg 20(6). For the meaning of 'contractor' see para 23 ante.

12 As to the Treasury see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 512-517.

13 Public Works Contracts Regulations 1991, SI 1991/2680, reg 20(7). Where a contracting authority is not a Minister of the Crown or a government department, that contracting authority must send any such report which it is required to send to the Treasury instead to the minister responsible for that contracting authority and that minister is responsible for sending the report to the Treasury: see reg 29(1). As to the responsibility for obtaining such reports see reg 29 (amended by SI 1999/1820). For the meaning of 'Minister of the Crown' see para 23 note 4 ante. As to the meaning of 'government department' see para 23 note 4 ante.

14 See the Public Works Contracts Regulations 1991, SI 1991/2680, reg 21. For the contract award notice see reg 21, Sch 2 Pt E (substituted by SI 2000/2009). As to the publication of notices see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 30.

15 See *ibid* reg 22(1) (reg 22 substituted by SI 2000/2009).

16 le whether pursuant to the Public Works Contracts Regulations 1991, SI 1991/2680, reg 11(7), reg 12(4) (as amended), reg 12(5) (as amended), reg 13(7), reg 13(8) (as amended) (see para 24 ante) or reg 20 (see the text and notes 1-13 supra).

17 See *ibid* reg 22(2) (as substituted: see note 15 supra). A contracting authority may withhold any information to be provided in accordance with reg 22(2) (as substituted) where the disclosure of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any person or might prejudice fair competition between contractors: reg 22(3) (as so substituted).

18 See *ibid* reg 22(4) (as substituted: see note 15 supra). If the EC Commission requests a report containing the information specified in reg 22(4) (as substituted), the contracting authority must send a written report containing that information, or the main features of it, to the Treasury for onward transmission to the Commission: reg 22(5) (as so substituted).

19 See *ibid* reg 28 (substituted by SI 2000/2009). Where a contracting authority is not a Minister of the Crown or a government department, that contracting authority must send any such report which it is required to send to the Treasury instead to the minister responsible for that contracting authority and that minister is responsible for sending the report to the Treasury: see the Public Works Contracts Regulations 1991, SI 1991/2680, reg 29(1). As to the responsibility for obtaining such reports see reg 29 (amended by SI 1999/1820).

UPDATE

26 Award of public works contracts

NOTE 2--There is an implied contract in respect of the award of a public works contract that the tendering process will be conducted fairly and in good faith: *Scott v Belfast Education and Library Board* [2007] NICH 4, (2007) 114 ConLR 209.

NOTE 4--In determining which is the most economically advantageous offer, environmental criteria may be taken into account if they satisfy certain requirements: Case C-513/99 *Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v Helsingin kaupunki* [2004] All ER (EC) 87, ECJ.

TEXT AND NOTES 10, 11--Any national legislation limiting the catalogue of explanations that are capable of being submitted to the contracting authority is contrary to Community law: Cases C-285/99, C-286/99 *Impresa Lombardini SPA-Impresa Generale di Costruzioni v Anas - Ente Nazionale per le Strade* [2004] 1 CMLR 2, ECJ.

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27. Exclusion of non-commercial considerations; 'best value' requirements.

Local and certain other public authorities¹ must exercise their functions in relation to public works and public supply contracts² without reference to non-commercial matters³. The duty arises whenever the authority exercises one of the following functions⁴:

- 42 (1) including persons in or excluding⁵ persons from approved lists of contractors⁶ or lists of persons who may be invited to tender⁷;
- 43 (2) accepting or refusing the submission of tenders⁸;
- 44 (3) selecting the person with whom to enter into the contract⁹;
- 45 (4) giving or withholding approval for, or selecting or nominating, sub-contractors¹⁰; and
- 46 (5) terminating contracts¹¹.

For these purposes non-commercial matters relate to¹²: (a) the terms of employment of the contractor's workforce¹³; (b) the composition of the workforce and opportunities afforded to it¹⁴; (c) whether the contractor uses self-employed labour¹⁵; (d) the contractor's involvement with irrelevant fields of government policy¹⁶; (e) conduct relating to industrial disputes¹⁷; (f) the country or territory of origin of supplies to the contractor, or the location of the contractor's business interests in any country or territory¹⁸; (g) political, industrial, or sectarian affiliations or interests of the contractor and its directors, partners or employees¹⁹; (h) financial support or the withholding of it by the contractor for any institution to or from which the authority gives or withholds support²⁰; and (i) the use or non-use of certain services provided by the authority under building legislation²¹. The Secretary of State²² may add to the list by order made by statutory instrument²³. The matters listed in the Local Government Act 1988 are described in broad terms and if necessary a purposive construction will be given to the descriptions to give effect to the statute²⁴. Corresponding matters referable to associated bodies, suppliers and customers, and sub-contractors are to be treated as matters referable to the contractor for these purposes²⁵. The duty of a local authority to eliminate unlawful racial discrimination²⁶, is the subject of a particular exception to these rules on non-commercial matters²⁷.

Local and certain other authorities also have imposed upon them a duty to comply with 'best value' requirements, having regard to a combination of economy, efficiency and effectiveness, and they must make arrangements to secure continuous improvements in the way in which their functions are exercised²⁸.

1 As to the public authorities see the Local Government Act 1988 s 17(2), Sch 2 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 492.

2 I.e. contracts for the supply of goods or materials, for the supply of services or for the execution of works: see *ibid* s 17(3); and LOCAL GOVERNMENT vol 69 (2009) PARA 497.

3 See *ibid* s 17(1). Any potential or former potential contractor or body representing contractors may bring proceedings for judicial review of a decision breaching the duty of exercising functions without reference to non-commercial matters: see s 19(7)(a). Failure to comply with the duty under s 17(1) is actionable by any person who in consequence suffers loss or damage: see s 19(7)(b). The damages recoverable are limited to expenditure reasonably incurred in submitting the tender: see s 19(8). See further LOCAL GOVERNMENT vol 69 (2009) PARA 497.

4 Where a public authority exercises a function regulated by *ibid* s 17 (as amended), it is the duty of the authority, in relation to certain decisions it makes, to notify that person of the decision, and that person may require the authority to furnish him with a written statement of the reasons for the decision: see *ibid* s 20; and LOCAL GOVERNMENT vol 69 (2009) PARA 501.

5 This includes removing persons from a list: see *ibid* s 17(8).

6 'Contractor', except in relation to a subsisting contract, means a 'potential contractor', ie: (1) in relation to functions as respects an approved list, any person who is or seeks to be included in the list; and (2) in relation to functions as respects a proposed public supply or works contract, any person who is or seeks to be included in the group of persons from whom tenders are invited or who seeks to submit a tender for or enter into the proposed contract, as the case may be: *ibid* s 17(8).

7 See *ibid* s 17(4)(a), (b)(i); and LOCAL GOVERNMENT vol 69 (2009) PARA 498.

8 See *ibid* s 17(4)(b)(ii); and LOCAL GOVERNMENT vol 69 (2009) PARA 498.

9 See *ibid* s 17(4)(b)(iii); and LOCAL GOVERNMENT vol 69 (2009) PARA 498.

10 See *ibid* s 17(4)(b)(iv), (c)(i); and LOCAL GOVERNMENT vol 69 (2009) PARA 498.

11 See *ibid* s 17(4)(c)(ii); and LOCAL GOVERNMENT vol 69 (2009) PARA 498.

12 The non-commercial matters specified in *ibid* s 17(5) include matters which have occurred in the past as well as those subsisting when the function is to be exercised: s 17(6).

13 See *ibid* s 17(5)(a); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

14 See *ibid* s 17(5)(a); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

15 See *ibid* s 17(5)(b); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

16 See *ibid* s 17(5)(c); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

17 See *ibid* s 17(5)(d); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

18 See *ibid* s 17(5)(e); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

19 See *ibid* s 17(5)(f); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

20 See *ibid* s 17(5)(g); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

21 See *ibid* s 17(5)(h); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

22 As to the Secretary of State see para 9 note 4 ante. As to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the National Assembly for Wales see para 9 note 4 ante.

23 See the Local Government Act 1988 s 19(1); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

24 *R v Islington London Borough Council, ex p Building Employers' Federation* (1989) 45 BLR 45 (where the Local Government Act 1988 s 17(5)(a) was considered).

25 See *ibid* s 17(7); and LOCAL GOVERNMENT vol 69 (2009) PARA 499.

26 Ie the duty under the Race Relations Act 1976 s 71 (as substituted): see DISCRIMINATION vol 13 (2007 Reissue) para 469.

27 See the Local Government Act 1988 s 18 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 500.

28 See LOCAL GOVERNMENT vol 69 (2009) PARA 688 et seq.

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(iv) Factors Vitiating Agreement

28. Secret commissions.

Where the contractor has agreed to pay a commission to any agent of the employer in order to secure the acceptance of a tender, the employer may rescind the contract¹ and may sue the agent for any commission received and for damages². He may also sue the contractor for damages³.

The employer may dismiss an architect who agrees to accept a secret commission from a contractor and can refuse to pay the architect's fees⁴. It is a breach of his terms of engagement for an architect or surveyor to have any financial relationship with the contractor unknown to the employer and such breach, unless waived, releases the employer from his liability to the architect or surveyor⁵.

1 *Alexander v Webber* [1922] 1 KB 642; *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515 at 526 per James LJ; *Logicrose v Southend United Football Club Ltd* [1988] 1 WLR 1256, 132 Sol Jo 1591.

2 *Salford Corpn v Lever* [1891] 1 QB 168, CA; cf *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 (revsd on another point [1996] 1 Lloyd's Rep 589, CA); and see AGENCY vol 1 (2008) PARAS 93-94, 139. The employer cannot require his agent to sue for a sum promised by way of secret commission: *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11, CA.

3 *Salford Corpn v Lever* [1891] 1 QB 168, CA; *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC.

4 *Tahrland v Rodier* (1866) 16 LCR 473 (Que); *Temperley v Blackpool Manufacturing Co Ltd* (1907) 71 JP Jo 341.

5 *Thornton Hall & Partners v Wembley Electrical Appliances Ltd* [1947] 2 All ER 630, CA.

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29. Misrepresentation.

A misrepresentation is a false statement of fact and is fraudulent if made recklessly or with intention to deceive¹. A contractor induced to enter a contract by a fraudulent misrepresentation may either rescind the contract or claim damages or both². A contractor induced to enter a contract by reason of an innocent misrepresentation may also rescind the contract or claim damages, but the court has discretion to award damages in lieu of rescission³. Generally, the measure of damages payable under the Misrepresentation Act 1967 is the sum of money which will place the representee in the position he would have been in if the representation had not been made⁴.

It is a defence to a claim for damages for innocent misrepresentation to show that the defendant had reasonable grounds for believing the statement to be true and that such belief continued until the date of the contract⁵. A contractor who continues to act upon a contract after discovering that a statement was false loses his right to rescind by reason of his affirmation of the contract⁶ and he will only be entitled to the price agreed under that contract⁷. A clause limiting liability for misrepresentation will only have effect in so far as it satisfies the requirement⁸ of reasonableness⁹.

The employer does not impliedly warrant that statements in bills of quantities are accurate; statements in bills of quantities are not representations that the work there described is sufficient for the completion of the contract¹⁰.

1 See *Derry v Peek* (1889) 14 App Cas 337, HL; and MISREPRESENTATION AND FRAUD.

2 *Moss & Co Ltd v Swansea Corp* (1910) 74 JP 351 (rescission); *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351, HL (it is immaterial that the statement was made by the employer's agent). See also AGENCY vol 1 (2008) PARAS 135, 152. As to the personal liability of a company officer on a fraudulent misrepresentation made by him in his capacity as such see *Thomas Saunders Partnership v Harvey* (1989) 30 ConLR 103. As to the rescission of contracts see CONTRACT vol 9(1) (Reissue) para 986 et seq. As to damages for breach of contract see DAMAGES vol 12(1) (Reissue) paras 819 et seq, 941 et seq.

3 See the Misrepresentation Act 1967 s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 834. See also *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; *Floods of Queensbury Ltd v Shand Construction Ltd* [2000] BLR 81.

4 See *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560 at 574, [1992] 1 All ER 865 at 876 per Sir Donald Nicholls VC.

The measure of damages for misrepresentation under the Misrepresentation Act 1967 s 2(1) is the same as that which applies to an action for fraudulent misrepresentation at common law: see *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; and DAMAGES vol 12(1) (Reissue) para 1109; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) paras 801, 811. The correctness of this decision was left open by the House of Lords: see *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 282-283, [1996] 4 All ER 769 at 792, HL, per Lord Steyn.

The measure of damages in lieu of rescission for innocent misrepresentation under the Misrepresentation Act 1967 s 2(2) is the difference in value between what the representee was misled into thinking he was contracting for and the value of what he in fact received: see *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; and DAMAGES vol 12(1) (Reissue) para 1110; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 834.

5 See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 801. See also *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495; *Garden Neptune Shipping Ltd v Occidental Worldwide Investment Corpn* [1990] 1 Lloyd's Rep 330, CA.

6 *Ormes v Beadel* (1860) 2 De GF & J 333. See also *Long v Lloyd* [1958] 2 All ER 402, [1958] 1 WLR 753, CA; and generally CONTRACT.

7 *Selway v Fogg* (1839) 5 M & W 83; *Glasgow and South Western Rly Co v Boyd and Forrest* [1915] AC 526, HL.

8 lie under the Unfair Contract Terms Act 1977 s 11(1): see CONTRACT vol 9(1) (Reissue) para 831.

9 See the Misrepresentation Act 1967 s 3 (as substituted); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 803. See also *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351, HL.

10 *Sherren v Harrison* (1860) 2 Hudson's BC (4th Edn) 5; *Scrivener v Pask* (1886) LR 1 CP 715; *Re Ford & Co and Bemrose & Sons Ltd* (1902) 2 Hudson's BC (4th Edn) 324 at 330, CA, per Collins MR; *Kimberley v Dick* (1871) LR 13 Eq 1.

UPDATE

29 Misrepresentation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(4) SPECIAL PARTIES AND FORMALITIES

(i) Special Parties

30. Local authorities.

Local authorities must make standing orders in relation to contracts for the supply of goods or materials or for the execution of works¹, and they may make standing orders in respect of any other contract to be made by them or on their behalf². The contractor is not required to inquire whether the standing orders applicable to his contract have been complied with, and despite non-compliance with such orders contracts otherwise valid will have full force and effect³. A contract entered into by a committee of the local authority may be ratified⁴ even though the power to enter contracts had not been delegated to the committee⁵. A contractor may rely on a contract or variation of the terms of a contract agreed by an officer of a local authority having ostensible authority to contract on its behalf⁶.

1 See the Local Government Act 1972 s 135(2); and LOCAL GOVERNMENT vol 69 (2009) PARA 492. As to public works contracts awarded by local authorities see para 23 et seq ante. As to contracts of local authorities see AGENCY vol 1 (2008) PARA 23; LOCAL GOVERNMENT vol 69 (2009) PARA 492 et seq. As to standard forms see para 2 ante.

2 See the Local Government Act 1972 s 135(1); and LOCAL GOVERNMENT vol 69 (2009) PARA 492. As to the general power of the local authority to make, vary or revoke standings orders with respect to proceedings and business see LOCAL GOVERNMENT vol 69 (2009) PARA 620.

3 See ibid s 135(4); and LOCAL GOVERNMENT vol 69 (2009) PARA 492. But see *North West Leicestershire District Council v East Midlands Housing Association Ltd* [1981] 3 All ER 364, [1981] 1 WLR 1396, CA.

4 *Kidderminster Corpn v Hardwick* (1873) LR 9 Exch 13.

5 Any delegation should be made in pursuance of the Local Government Act 1972 ss 101, 102 (both as amended); see LOCAL GOVERNMENT vol 69 (2009) PARA 370 et seq.

6 *Carlton Contractors Ltd v Bexley Corpn* (1962) 60 LGR 331; *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 245. Cf *North West Leicestershire District Council v East Midlands Housing Association Ltd* [1981] 3 All ER 364, [1981] 1 WLR 1396, CA (council clerk had no ostensible authority).

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31. Companies, corporations and partnerships.

A contract may be made by a company in writing under its common seal¹, or on behalf of the company by any person acting under its express or implied authority². Any formalities required by law in the case of a contract made by an individual also apply to a contract made by a company unless a contrary intention appears³. The validity of any act of a company cannot be questioned by reason of anything in the company's memorandum⁴. Where a person deals with a company in good faith there is deemed to be no limit under the company's constitution to the power of the board of directors to bind the company⁵.

Contracts made by or on behalf of a corporation which if made by private persons would be required to be in writing, or which would be valid although made by parol only, may be similarly made on behalf of a corporation by any person acting under its express or implied authority⁶. The capacity of a corporation to contract depends on the terms of the Act under which it was incorporated or on its charter.

When either party is a member of a partnership, the partnership will be liable under the contract if the contracting partner was acting within the scope of his authority⁷.

1 However, a company need not have a common seal: see the Companies Act 1985 s 36A(3) (as added); and COMPANIES vol 14 (2009) PARA 287 et seq. Whether a company has a common seal or not, a document signed by a director and the secretary of a company or by two directors and expressed to be executed by the company has the same effect as if executed under the common seal of the company: see the Companies Act 1985 s 36A(3), (4) (as added); and COMPANIES vol 14 (2009) PARA 288. As to the application of the Companies Act 1985 s 36 (as substituted) and s 36A (as added) to companies incorporated outside Great Britain see the Foreign Companies (Execution of Documents) Regulations 1994, SI 1994/950 (as amended); and COMPANIES vol 14 (2009) PARAS 282, 290.

2 See the Companies Act 1985 s 36 (as substituted); and COMPANIES vol 14 (2009) PARA 282. See also note 1 *supra*.

3 See *ibid* s 36 (as substituted); and COMPANIES vol 14 (2009) PARA 282. See also note 1 *supra*.

4 See the Companies Act 1985 s 35(1) (as substituted); and COMPANIES vol 14 (2009) PARA 265. See also *Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] BCLC 507, CA; *Badgerhill Properties Ltd v Cottrell* (1991) 54 BLR 23, CA.

5 See the Companies Act 1985 s 35A (as added and amended); and COMPANIES vol 14 (2009) PARA 263. There is no duty on the party to a transaction to inquire as to the capacity of the company or the authority of the directors: see s 35B (as added); and COMPANIES vol 14 (2009) PARA 263.

6 See the Corporate Bodies' Contracts Act 1960 s 1(1); and CORPORATIONS vol 9(2) (2006 Reissue) para 1272. A corporation may continue to make its contracts under seal if it so wishes: see s 1(4); and CORPORATIONS vol 9(2) (2006 Reissue) para 1272.

7 See the Partnership Act 1890 ss 5-8; and PARTNERSHIP.

UPDATE

31 Companies, corporations and partnerships

NOTE 1--1985 Act s 36A replaced with amendments: Companies Act 2006 s 44.

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32. The Crown and government departments.

The Crown is bound by a contract made by a proper agent acting within the scope of his authority but not otherwise. A Crown agent who enters into a contract beyond the scope of his authority is not liable for breach of warranty of authority¹. Actions against the Crown are instituted against the appropriate government department². Contracts entered into by government departments are subject to control under European Community law unless exempted from it³.

1 *Dunn v Macdonald* [1897] 1 QB 401; affd [1897] 1 QB 555, CA; and see further ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) para 180; AGENCY vol 1 (2008) PARA 160; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 388.

2 A list of departments is published from time to time by the Minister for the Civil Service in accordance with the Crown Proceedings Act 1947 s 17 (as amended) (see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) para 119).

3 See para 22 et seq ante.

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(ii) Formalities

33. Where writing is required.

Contracts for works of construction are almost invariably in writing¹. Where the contract involves the sale or other disposition of an interest in land, the contract must be in writing² and must be signed by or on behalf of each party to the contract³. The employer may require sureties for the due performance of the contract by the contractor⁴ and any such contract of surety must be in writing⁵.

1 It is, however, not essential for such a contract to be in writing, but where it is not the question whether or not a contract has actually been entered into will be determined by a consideration of all the facts upon which the contract is said to be based: *Allen v Yoxall* (1844) 1 Car & Kir 315. See also *Smith v Neale* (1857) 2 CBNS 67; *Russell v Trickett* (1865) 13 LT 280. See also CONTRACT vol 9(1) (Reissue) para 623 et seq; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 1 et seq.

However, a contract must be in writing to be a construction contract within the meaning of the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended): see para 10 ante.

2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and SALE OF LAND vol 42 (Reissue) para 29 et seq. Where the contract for the sale of land is varied the formalities also apply to the variation: see *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38, CA; and SALE OF LAND vol 42 (Reissue) para 33.

3 See the Law of Property (Miscellaneous Provisions) Act 1989; *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA; and SALE OF LAND vol 42 (Reissue) para 29 et seq.

4 As to sureties generally see para 186 et seq post. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 PARA 1013 et seq.

5 See the Statute of Frauds (1677) s 4 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052. See also *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21, [1991] 3 All ER 758, HL; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1064 et seq. But a contract of indemnity does not have to be in writing: *Lakeman v Mountstephen* (1874) LR 7 HL 17.

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(iii) The Ascertainment and Meaning of Terms

34. Whether a question of law or of fact.

Where the contract has been reduced to writing, its interpretation is a question of law for the court to decide¹. Evidence of an oral term which would add to or vary the written instrument will generally be inadmissible². However, where the meaning of a term depends on a particular custom, evidence is admissible to prove the custom³. Oral evidence is also admissible to establish the meaning of a technical term⁴. There is a presumption that a written contract is intended to contain all the agreed terms, but the presumption is rebuttable⁵ and it is possible for the contract to be partly oral and partly in writing. Where the contract was made orally, the ascertainment of its terms is a question of fact⁶.

1 As to the construction of written contracts generally see CONTRACT vol 9(1) (Reissue) para 772 et seq; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 164 et seq. When a concluded written contract has been entered into, extrinsic evidence of, for example, preliminary negotiations, subsequent conduct or intent are normally inadmissible as an aid to the construction of the contract: see CONTRACT vol 9(1) (Reissue) paras 622, 690; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185 et seq. Restricted evidence of the factual background to and surrounding circumstances of a contract will be admissible: see *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL; *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, HL; *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 164, 198. See also *Matthew Hall Ortech Ltd v Tarmac Roadstone Ltd* (1997) 87 BLR 96 (where the guidance notes to a standard form were admissible as part of the surrounding circumstances).

2 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185 et seq.

3 *North v Bassett* [1892] 1 QB 333; and see CUSTOM AND USAGE vol 12(1) (Reissue) para 669. See also *Tony Cox (Dismantlers) Ltd v Jim 5 Ltd* (1996) 13 Const LJ 209 (custom in the construction industry that prices quoted were exclusive of VAT); cf *Lancaster v Bird* (1999) Times, 9 March, (1998) 73 ConLR 22, CA (no implied term that prices generally are exclusive of VAT).

4 *Symonds v Lloyd* (1859) 6 CBNS 691; *Myers v Sarl* (1860) 3 E & E 306; *Bank of New Zealand v Simpson* [1900] AC 182, PC. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 202 et seq.

5 See eg *Allan v Pink* (1838) 4 M & W 140.

6 *Smith v Hughes* (1871) LR 6 QB 597; and see CONTRACT vol 9(1) (Reissue) para 631 et seq.

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35. Implied terms.

In a building contract there are four principal ways in which a term will be implied: (1) implication by statute¹; (2) implication to make the contract work²; (3) implication of 'usual terms'³; or (4) implication by custom⁴. Implied terms are dealt with elsewhere in this work⁵.

1 Terms may be implied into building contracts by virtue of, for example, the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended), the Supply of Goods and Services Act 1982 Pt II (ss 12-16) and the Late Payment of Commercial Debts (Interest) Act 1998 s 1. As to implication by law see CONTRACT vol 9(1) (Reissue) para 781.

Under the Housing Grants, Construction and Regeneration Act 1996 Pt II (as amended), where a building contract is also a construction contract within the meaning of that Act (see para 9 ante), it must contain certain provisions in relation to the right to refer disputes to adjudication and as to matters concerning payment, and where it does not contain such provision, the relevant provisions of the scheme for construction contracts apply by default: see paras 9-10 ante, 154-160, 206 et seq post. Where any provisions of the scheme so apply, they have effect as implied terms of the contract concerned: see s 114(4).

A building contract is a contract for the supply of a service, and as such the Supply of Goods and Services Act 1982 Pt II applies to building contracts, and implies that a supplier acting in the course of business will carry out the service with reasonable care and skill (see s 13), and, subject to certain qualifications, that the supplier will carry out the service within a reasonable time (see s 14) and that the supplier will be paid a reasonable charge (see s 15). See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 97-99.

In relation to a contract to which the Late Payment of Commercial Debts (Interest) Act 1998 applies, it is an implied term that any qualifying debt created by the contract carries simple interest subject to and in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 Pt I (ss 1-6) (as amended): see s 1; para 151 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 220 et seq.

2 Where the parties have drawn up a detailed contract it may be necessary to imply a term to make it work and give efficacy to the contract: see eg *The Moorcock* (1889) 14 PD 64, CA; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 118 LT 479, CA; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973] 1 WLR 601, HL; *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, HL; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. See also CONTRACT vol 9(1) (Reissue) para 782 et seq.

3 If a contract deals expressly with a matter, no term dealing with the same matter will be implied: *Jones v St John's College, Oxford* (1870) LR 6 QB 115; *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA. Where, however, its terms do not deal with certain matters or where there is no express written contract particular terms are usually implied.

So far as the employer is concerned it is implied that all necessary co-operation will be afforded to bring about completion of the contract: *Mackay v Dick* (1881) 6 App Cas 251, HL; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; *Merton London Borough Council v Stanley Hugh Leach Ltd* (1985) 32 BLR 51, (1985) 2 Const LJ 189. The corollary to this is that the employer will not prevent the contractor from performing the contract: *William Cory & Son Ltd v City of London Corp*n [1951] 2 KB 476, [1951] 2 All ER 85, CA. Examples of the implied terms referred to include:

- 9 (1) giving possession of the site to the contractor (*Freeman & Son v Hensler* (1900) 2 Hudson's BC (4th Edn) 292, (1900) 64 JP 260, CA; *Hounslow London Borough Council v Twickenham Garden Developments* [1971] Ch 233, [1970] 3 All ER 326);
- 10 (2) appointing an architect to supervise the work (see *Hunt v Bishop* (1853) 8 Exch 675);
- 11 (3) requiring the employer to ensure the certifier performs his duties properly (save where the contract contains an arbitration clause making such an implied term unnecessary), not to interfere with the proper performance of his duties and not act so as to disqualify the certifier

(*Frederick Leyland & Co Ltd v Compania Panamena Europea Navegacion Ltda* (1943) 76 Ll L Rep 113, CA; *Perini Corp v Commonwealth of Australia* (1969) 12 BLR 82; *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963; *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire DC* (1986) 33 BLR 39, CA);

- 12 (4) implied obligation to supply instructions, nominations, information, plans and details as required at reasonable times (*Roberts v Bury Improvement Comrs* (1870) LR 5 CP 310; *McAlpine v Lanarkshire and Ayrshire Rly Co* (1889) 17 R 113, Ct of Sess; *Wells v Army and Navy Co-operative Society* (1902) 2 Hudson's BC (4th Edn) 346; *Neodox Ltd v Swinton and Pendlebury Borough Council* (1958) 5 BLR 34; *Holland & Hannen Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80);
- 13 (5) not to interfere in the supply of goods necessary for the completion of the contract (*Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA).

So far as the contractor is concerned he is obliged to execute the work with all proper skill and care or in a good and workmanlike manner: see *Duncan v Blundell* (1820) 3 Stark 6; *Charnock v Liverpool Corp* [1968] 3 All ER 473, [1968] 1 WLR 1498, CA; *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL. If he is to supply materials then, unless there is an operative exclusion, he impliedly warrants that the materials are reasonably fit for their intended use and are of good quality: *Young & Marten Ltd v McManus Childs Ltd* supra; *Gloucestershire County Council v Richardson (t/a WJ Richardson & Son)* [1969] 1 AC 480, [1968] 2 All ER 1181, HL; *Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd* (1996) 78 BLR 1, (1996) 59 ConLR 33, CA.

4 A term may be implied from custom and usage. Such terms may be proved by parol evidence, but the custom must be reasonable and must not contradict the contract: see *Robinson v Thompson* (1890) 89 LT Jo 137, DC; *North v Bassett* [1892] 1 QB 333; *Knox and Robb v Scottish Garden Suburb Co Ltd* 1913 SC 872 (authority of architect); *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314, HL; and see CONTRACT vol 9(1) (Reissue) para 780; CUSTOM AND USAGE; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) paras 181, 203. Whether there is such a custom is a question of fact and whether the custom is reasonable is a question of law for the court to decide: see *Gwyther v Gaze* (1875) 2 Hudson's BC (4th Edn) 34; *Ebdy v McGowan* (1870) 2 Hudson's BC (4th Edn) 9; *Thorn v London Corp* (1876) 1 App Cas 120 at 132, HL, per Lord Chelmsford; *Croshaw v Pritchard and Renwick* (1899) 16 TLR 45; and CUSTOM AND USAGE.

- 5 See CONTRACT vol 9(1) (Reissue) para 778 et seq.

UPDATE

35-36 Implied terms, Explanation of words and phrases

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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36. Explanation of words and phrases.

Certain words and phrases occurring in building contracts have been construed judicially for the purposes of the particular contracts in which they occur. These are set out below, but it must be borne in mind that the meanings given to them are not necessarily applicable in all cases as the interpretation of each contract must depend upon the construction of its particular terms.

'Abut' and 'abutting' denote physical contact¹.

An act of God is such an operation of the forces of nature as reasonable foresight and ability could not foresee or reasonably provide against².

The degree of proximity denoted by the term 'adjacent' is a question of circumstances³.

'Adjoining' does not necessarily imply absolute contiguity⁴.

To 'afford access' means that there must be a physical means of access and at the relevant time the contractor must have the opportunity to enter by means of that access⁵.

'Approval' means, it would seem, in general approval with full knowledge, or at all events approval with the opportunity of full knowledge⁶.

An 'approved plan', referring to a plan approved by a local authority, means one lawfully approved, and not one which, though approved by the authority, is illegal⁷.

In the context of a clause prohibiting assignment, 'any sum which is or may become due or payable' means a claim which can be expressed simply as a present or future claim for a fixed amount due under the contract and excludes claims for damages or for sums which fall to be assessed under or in accordance with the terms of the contract⁸.

'Arise out of, under or in connection with the contract or the works' includes a claim for damages under the Misrepresentation Act 1967⁹.

'As far as possible' means as far as possible consistently with reasonable trade requirements¹⁰.

'Brick-built' means brick-built in the ordinary sense, and does not include a house built partly of brick and partly of timber, with some parts of the exterior composed of lath and plaster, and without party walls¹¹.

A building in its popular sense is a structure with walls and roof¹². The following constructions have been judicially held to be included in the term 'building' as contained in various statutes, byelaws and deeds: an addition to an existing building¹³; a bay or bow window¹⁴; a church¹⁵; a place with four walls, a roof and a door used for keeping manure¹⁶; a trellis 12 feet high¹⁷; a high wall¹⁸; a structure of wood 16 feet by 13 feet not let into the ground, but merely laid upon timbers upon the surface, and intended to be permanently used as a shop¹⁹; a reservoir²⁰; a viaduct²¹; a glasshouse²²; a van fixed on foundations in the ground²³; a tunnel²⁴; a summerhouse²⁵; a shed on a wharf²⁶; an unfinished structure²⁷; a roof inclosure²⁸; a greenhouse²⁹; a glass showcase in front of a photographer's house³⁰; a temporary wooden platform³¹. The following have been held not to be included in the term 'building': a conservatory erected at the side of and leaning against a house³²; a hoarding³³; hustings for an election³⁴; a timber stack³⁵; a boundary wall³⁶; a screen to prevent newly-erected houses acquiring a right to light³⁷; the entire undertaking of a canal company³⁸; a dwarf wall³⁹; a

separate set of chambers in one building⁴⁰; a wall for a covered way⁴¹; a temporary brick kiln⁴²; a temporary brick structure for storing tools⁴³; a portable theatre constructed of wood⁴⁴.

Lands used for 'building purposes' within the meaning of the Lands Clauses Consolidation Act 1845⁴⁵, are lands actually laid out for that purpose⁴⁶.

'Bungalow' means primarily a one-storey building⁴⁷; a building of which the walls, with the exception of any gables, are no higher than the ground floor, and of which the roof starts at a point substantially not higher than the top of the wall of the ground floor, regardless of the manner in which the space left in the roof is used⁴⁸.

'Bursting of tanks or pipes' in a JCT form means the rupture of the tank or pipe from within, typically caused by the exertion of forces, such as expansion or pressure, from within the vessel or pipe itself⁴⁹.

'Completion' means 'practical completion'⁵⁰. 'Completion', as regards third parties, means completion in fact, and not completion to the satisfaction of the architect or otherwise ascertained in some manner prescribed by the contract⁵¹.

'Consequential loss' means loss and damage which does not directly and naturally result from a defendant's breach of contract⁵².

The term 'contingency sums' has no specific legal meaning⁵³.

'Continuity of work' involves the contractor having on site and using effectively such labour, materials and equipment as are needed in order to complete the works in a reasonable time⁵⁴.

'Day-work' is work which under the terms of the contract is to be paid for by time and materials, and not by measurement.

'Direct loss and/or expense' in JCT forms means that which arises naturally and in the ordinary course of things⁵⁵.

As respects a dwelling house⁵⁶, the term 'dwelling' implies a building used or capable of being used as a residence by one or more families, and provided with all necessary parts and appliances, such as floors, windows, staircases⁵⁷.

Where a house is pulled down leaving a wall of an adjoining house thereby exposed, the exposed wall forms an 'external part' of the house which is left standing⁵⁸.

'Flood' in a JCT form means an invasion of property by a large volume of water caused by a rapid accumulation or sudden release of water from an external source, usually, but not necessarily, confined to the result of a natural phenomenon such as a storm, tempest or downpour⁵⁹.

The meaning of the term 'front main wall' depends on all the circumstances of the case; the building must be looked at as a whole, and no particular portion must be selected to determine it⁶⁰.

The term 'house' is similar in meaning to the term 'dwelling house'⁶¹. In the interpretation of various instruments and statutes the term 'house' has been held to include the following⁶²: a collection of buildings used for one purpose⁶³; a building containing several residential flats⁶⁴; each of two tenements, the one on the ground floor and the other on the first floor of the same building, there being no intercommunication between them, and each having a separate front door⁶⁵; a mews building with the ground floors occupied by garages and the upper floors used as dwelling places⁶⁶; a shop with living rooms over it⁶⁷; a tenement⁶⁸; an aeroplane hangar⁶⁹; a chapel with vestry and rooms for caretaker attached⁷⁰; everything that would pass under the grant or devise of house⁷¹; a building belonging to trustees of a religious association and used for purposes of religious service in the daytime, and at night as a shelter for homeless and destitute poor⁷². On the other hand, a building intended for a dwelling house, but never completed⁷³ and used as a store for straw and agricultural implements, is not a house⁷⁴.

'In due time' in a JCT form means 'in a reasonable time' and not 'in time to avoid delay'⁷⁵.

'Maintain' has a double meaning, namely to maintain in exactly the same state as it was found, or by making improvements without any alteration of purpose⁷⁶.

'Measurement and value contract' described the ICE Conditions (4th Edn)⁷⁷.

'Minerals' comprise all substances lying in the strata of the land which are commonly worked for profit and have a value independent of the surface⁷⁸, unless there is something in the context or in the nature of the transaction which gives rise to a more limited interpretation⁷⁹, and the words must be construed in the vernacular of the mining world, commercial world and landowners at the time of the execution of the instrument⁸⁰. In the interpretation of various instruments and statutes the term 'minerals' has been held to include the following: stones dug from quarries⁸¹; all fossil bodies⁸²; granite⁸³; brine⁸⁴; gravel⁸⁵; freestone⁸⁶.

'Necessary' includes what is proper⁸⁷.

'Or other approved' does not give a contractor a right to have a reasonable alteration accepted⁸⁸.

The term 'plastering' does not include 'gauging', that is mixing plaster of Paris⁸⁹.

'Possession of like site' means in a JCT form possession of the whole site⁹⁰.

'Practical completion' in JCT forms means completion of all the work that has to be constructed other than items de minimis and latent defects⁹¹.

'Premises', although applied to buildings, in legal language means the subject or thing previously expressed⁹².

The term 'prime cost sum' or 'p c' is used in building and engineering contracts to indicate that a sum has been provided in the contract to enable the contractor to cover work or services to be provided by a nominated sub-contractor⁹³ or goods to be obtained from a nominated supplier⁹⁴. The sum provided is only an estimate of the actual cost of the work, the true value of which will be calculated by the architect and paid by the employer to the contractor. The contractor can only deduct and keep for himself the value of a sub-contractor's or supplier's discount if this is expressly provided for in the main contract, whether the deduction is to be made as a trade discount or as a discount for payment in cash⁹⁵.

'Probationary drawings' means drawings to be approved by or on behalf of the employer⁹⁶.

A 'provisional sum' will be inserted in a bill of quantities to cover certain items of work in building or engineering contracts which cannot be accurately defined, detailed or valued at the time when the tendering documents are issued by the employer. In such cases the contractor will be paid the true value of the item after it has been calculated by the architect.

'Rate of wages' in a rise and fall clause includes holiday money credited to the employee weekly⁹⁷.

'Rebuild' means to rebuild the whole of a house or building, and not merely partially to replace old work by new⁹⁸.

In the phrase 'regularly and diligently', the word 'regularly' imports a requirement to 'attend for work on a regular daily basis with sufficient in the way of men, materials and plant to have the physical capacity to progress the works substantially in accordance with the contractual obligations. What in particular the word 'diligently' contributes to the concept is the need to apply that physical capacity industriously and efficiently towards that same end. Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work'⁹⁹.

The term 'repair' may mean either patching or renewing, according to circumstances¹⁰⁰. Under the Landlord and Tenant Act 1954, 'repairs' includes any work of maintenance, decoration or restoration and references to repairing, to keeping or yielding up in repair and to 'state of repair' must be construed accordingly¹⁰¹.

The expression 'several works' means 'the whole works,' and, for the purpose of calculating the period of maintenance, not each separate section of them¹⁰².

A 'specification' is a detailed description of building, engineering, and other works executed or proposed to be executed¹⁰³.

A 'structure' includes anything to which the term 'built' can be applied¹⁰⁴.

Parol evidence may be admitted to show that by the usage of the building trade 'weekly accounts' means accounts of day-work only, and does not extend to extra work which is capable of being measured¹⁰⁵.

'Works for the erection of a building' includes demolition and clearance work as preparation for erecting a building¹⁰⁶.

1 See *Roberts v Karr* (1809) 1 Taunt 495; *R v Strand Board of Works* (1863) 4 B & S 526; *Lightbound v Higher Bebington Local Board* (1885) 16 QBD 577, CA; *Barnett v Covell* (1903) 90 LT 29; *R (on prosecution of Lewisham Borough Council) v South Eastern Rly Co* (1910) 74 JP 137, CA.

2 *Baldwin's Ltd v Halifax Corp* (1916) 85 LJB 1769 at 1774 per Atkin J.

3 *Wellington Corp v Lower Hutt Corp* [1904] AC 773, PC; *Re Ecclesiastical Comrs for England's Conveyance* [1936] Ch 430 at 440-441 per Luxmoore J.

4 A piece of land separated from a churchyard by a public highway 20 feet broad is adjoining to an existing churchyard within the meaning of the Consecration of Churchyards Act 1867 s 1: *Re Baroness Bateman and Parker's Contract* [1899] 1 Ch 599. See also *Harrison v Good* (1871) LR 11 Eq 338; *Lightbound v Higher Bebington Local Board* (1885) 16 QBD 577, CA; *Haynes v King* [1893] 3 Ch 439; *Vale & Sons v Moorgate Street etc Buildings Ltd and Baker & Co Ltd* (1899) 80 LT 487; *Ind Coope & Co Ltd v Hamblin* (1900) 84 LT 168, CA; *Cave v Horsell* [1912] 3 KB 533, CA; *Derby Motor Cab Co v Crompton and Evans Union Bank* (1913) 29 TLR 673; *Foster v Lyons & Co* [1927] 1 Ch 219; *Cobstone Investments Ltd v Maxim* [1985] QB 140 at 151, [1984] 2 All ER 635 at 642-643, CA, per Wood J. In *R v Hodges* (1829) Mood & M 341 and *White v Harrow* (1902) 86 LT 4, CA, the word was held to connote physical contact. Cf *Southwark Revenue Officer v R Hoe & Co Ltd* (1930) 143 LT 544. See, as to 'adjoining owners' and 'adjoining occupiers', the London Building Act 1930 s 5. As to the London Building Acts see BUILDING.

5 *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981) 24 BLR 127.

6 See *Davis v Leicester Corp* [1894] 2 Ch 208. See also *Leedsford Ltd v Bradford City Council* (1956) 24 BLR 45, CA, for the meaning of 'or other approval'. As to architect's or employer's approval of works see para 92 et seq post.

7 *Yabicom v King* [1899] 1 QB 444, DC; *Re McIntosh and Pontypridd Improvements Co* (1891) 61 LJB 164, DC. As to approval unreasonably withheld see *Railways Comr v Avrom Investments Pty Ltd* [1959] 2 All ER 63, [1959] 1 WLR 389, PC. See also paras 23 et seq, 30 ante.

8 *David Charles Flood v Shand Construction Ltd* (1996) 81 BLR 31, (1996) 54 ConLR 125, CA.

9 *Strachan & Henshaw Ltd v Stein Industries (UK) Ltd* (1997) 87 BLR 52, CA. As to damages under the Misrepresentation Act 1967 see DAMAGES vol 12(1) (Reissue) paras 1109-1110; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) paras 801, 811.

10 Where furnaces were to be constructed so as to consume 'as far as possible' the smoke arising from them, it was held that 'as far as possible' meant 'as far as possible consistently with carrying on the trade in an ordinary manner and with a careful use and management of a properly constructed furnace': *Cooper v Woolley* (1867) LR 2 Exch 88 at 91 per Kelly CB.

11 *Powell v Double* (1832) cited in Sugden's Vendors and Purchasers (14th Edn) 29.

12 'One may say of this or that structure: 'this or that is not a building'; but no general definition can be given, and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by 'a building' is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time': *Stevens v Gourley* (1859) 7 CBNS 99 at 112 per Byles J. See also *Leicester Corpn v Brown* (1892) 62 LJMC 22, DC.

13 *R v Gregory* (1833) 5 B & Ad 555 at 563 per Parke J.

14 *Western v MacDermott* (1866) 2 Ch App 72; *Lord Manners v Johnson* (1875) 1 ChD 673.

15 *Folkestone Corpn v Woodward* (1872) LR 15 Eq 159; *R v Hickman* (1784) 1 Leach 318.

16 *Morish v Harris* (1866) LR 1 CP 155.

17 *Wood v Cooper* [1894] 3 Ch 671.

18 *Child v Douglas* (1854) 5 De GM & G 739; *Morish v Harris* (1866) LR 1 CP 155; *Bowes v Law* (1870) LR 9 Eq 636.

19 *Stevens v Gourley* (1859) 7 CBNS 99.

20 *Moran & Son Ltd v Marsland* [1909] 1 KB 744, DC; and cf *Carlisle RDC v Carlisle Corpn* [1909] 1 KB 471, CA.

21 *Lloyd v London, Chatham and Dover Rly Co* (1865) 2 De GJ & Sm 568.

22 *Smith v Richmond* [1899] AC 448, HL.

23 *James v Tudor* (1912) 77 JP 130.

24 *Schweder v Worthing Gas Light and Coke Co* [1912] 1 Ch 83.

25 *R v Norris* (1804) Russ & Ry 69.

26 *R v Rice* (1859) Bell CC 87.

27 *R v Worrall* (1836) 7 C & P 516; *R v Manning* (1871) LR 1 CCR 338.

28 *Clark v St Pancras Vestry* (1869) 34 JP 181.

29 *Clifford v Holt* [1899] 1 Ch 698; but see *Haigh v Waterman* (1867) 16 LT 375.

30 *Leicester Corpn v Brown* (1892) 62 LJMC 22.

31 *Aylward v Matthews* [1905] 1 KB 343, CA.

32 *Hibbert v Acton Local Board* (1889) 5 TLR 274, CA.

33 *Slaughter v Sunderland Corpn* (1891) 60 LJMC 91; *Foster v Fraser* [1893] 3 Ch 158. A hoarding, however, has been held to be 'a building or erection': *Pocock v Gilham* (1883) Cab & El 104; and cf *Nussey v Provincial Bill Posting Co and Eddison* [1909] 1 Ch 734, CA, and *Stevens v Willing & Co Ltd* [1929] WN 53 (where for the purpose of a restrictive covenant which used the word 'building' in a wide sense, a permanent advertisement hoarding was held to be a building).

34 *Allen v Ayre* (1823) 1 LJOSKB 204.

35 *Harris v De Pinna* (1886) 33 ChD 238, CA.

36 *Ellis v Plumstead Board of Works* (1893) 68 LT 291; *Urban Housing Co Ltd v Oxford City Council* [1940] Ch 70, [1939] 4 All ER 211, CA.

37 *Paddington Corpn v A-G* [1906] AC 1, HL.

38 *Regent's Canal and Dock Co v LCC* [1912] 1 Ch 583.

39 *Lavy v LCC* [1895] 2 QB 577, CA.

40 *Moir v Williams* [1892] 1 QB 264, CA.

- 41 *St Botolph, Aldersgate Without (Vicar) v St Botolph, Aldersgate Without (Parishioners)* [1900] P 69.
- 42 *Fielding v Rhyl Improvement Comrs* (1878) 3 CPD 272.
- 43 *Fielding v Rhyl Improvement Comrs* (1878) 3 CPD 272; *Gardiner v Walsh* [1936] 3 All ER 870.
- 44 *Newell v Ormskirk UDC* (1907) 71 JP 119.
- 45 See the Lands Clauses Consolidation Act 1845 s 128; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 904.
- 46 *Coventry v London, Brighton and South Coast Rly Co* (1867) LR 5 Eq 104 at 109 per Lord Romilly MR; and see *Charlton v Gibson* (1844) 1 Car & Kir 541; *London & South Western Railway Co v Blackmore* (1870) LR 4, HL 610. In the Law of Property Act 1925 s 205(1)(iii), and the Settled Land Act 1925 s 117(1)(i), the term 'building purposes' includes the erecting and improving of, and the adding to, and the repairing of buildings.
- 47 *Clothier v Snell* (1966) 198 Estates Gazette 27.
- 48 *Ward v Paterson* [1929] 2 Ch 396.
- 49 *Computer & Systems Engineering plc v John Lelliott (Ilford) Ltd* (1990) 54 BLR 1 at 10, CA, per Beldam LJ. As to JCT standard forms of contract see para 2 ante.
- 50 *Emson Eastern Ltd v EME Developments Ltd* (1991) 55 BLR 114; although there only in the context of a special clause of the JCT form (sed quaere in this instance) it would normally be so construed. As to practical completion see the text and note 91 infra.
- 51 *Lewis v Hoare* (1881) 44 LT 66, CA.
- 52 *British Sugar plc v NEI Power Projects Ltd* (1997) 87 BLR 42, CA. See also *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204, CA; *Wraight Ltd v PH & T (Holdings) Ltd* (1968) 13 BLR 26; *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55, 8 BLR 20, CA; *Caledonia North Sea Ltd v British Telecommunications plc* [2002] UKHL 4, [2002] BLR 139.
- 53 *Mander Raikes and Marshall v Severn Trent Water Authority* (1980) 16 BLR 34 at 45 per Parker J, who there describes the various ways in which that phrase and similar phrases may be used.
- 54 *Franks & Collingwood (a firm) v Gates* (1983) 1 ConLR 21 at 25 per Judge Newey QC.
- 55 *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1, CA; and see *Rees and Kirby Ltd v Swansea City Council* (1985) 30 BLR 1, (1985) 5 ConLR 34, CA. The duty to 'ascertain' loss and/or expense under the JCT standard form precludes the making of general assessments and means 'to find out for certain': *Alfred McAlpine Homes North Ltd v Property and Land Contractors Ltd* (1995) 76 BLR 59. As to JCT standard forms of contract see para 2 ante.
- 56 See also the definition of 'house' in the text to notes 61-74 infra; and 2 Words and Phrases (3rd Edn) 128 et seq; 1 Stroud's Judicial Dictionary (6th Edn) 760 et seq.
- 57 *Williams v Fitzmaurice* (1858) 3 H & N 844. A shed may be part of a dwelling house for some purposes: see *Ashworth v Heyworth* (1869) LR 4 QB 316; *McHole v Davies* (1875) 1 QBD 59 at 61 per Cockburn CJ. A building physically capable of being used as a human habitation but prevented either by common law or statute from being put to such use cannot be termed a house: *Wright v Ingle* (1885) 16 QBD 379, CA. In the London Building Act 1930 s 5, 'dwelling house' is defined as 'a building used or constructed or adapted to be used wholly or principally for human habitation'. As to the London Building Acts see BUILDING.
- 58 *Green v Eales* (1841) 2 QB 225. As to party walls see BOUNDARIES.
- 59 *Computer & Systems Engineering plc v John Lelliott (Ilford) Ltd* (1990) 54 BLR 1 at 10, CA, per Beldam LJ.
- 60 *A-G v Edwards* [1891] 1 Ch 194; *Ravensthorpe Local Board v Hinchcliffe* (1889) 24 QBD 168, DC; and *Leyton Local Board v Causton* (1893) 9 TLR 180, all decided under the Public Health (Buildings in Streets) Act 1888 s 3 (repealed).
- 61 A permanent building in which the tenant or the owner and his family dwell or live: *Chapman v Royal Bank of Scotland* (1881) 7 QBD 136 at 140 per Huddleston B.

62 See further 2 Words and Phrases (3rd Edn) 370 et seq; 2 Stroud's Judicial Dictionary (6th Edn) 1172-1173. These definitions may be important in view of a builder contracting to build something described as 'a house', and the architect requiring variations of the work the effect of which the builder alleges is to make the structure no longer 'a house', but something different.

63 *Richards v Swansea Improvement and Tramways Co* (1878) 9 ChD 425, CA (under the Lands Clauses Consolidation Act 1845 s 92). See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 625 et seq.

64 *Kimber v Admans* [1900] 1 Ch 412, CA, under a covenant not to erect more than a certain number of houses; but see *Rogers v Hosegood* [1900] 2 Ch 388, CA.

65 *Ilford Park Estates Ltd v Jacobs* [1903] 2 Ch 522, under a covenant not to erect more than one house on a site.

66 *Re Butler, Camberwell (Wingfield Mews) No 2 Clearance Order 1936* [1939] 1 KB 570, [1939] 1 All ER 590, CA, decided under the Housing Act 1936 s 25 (repealed; see now the Housing Act 1985 s 289 (as amended)). See further HOUSING vol 22 (2006 Reissue) para 425 et seq.

67 *Re Bainbridge, South Shields (D'Arcy Street) Compulsory Purchase Order 1937* [1939] 1 KB 500, [1939] 1 All ER 419.

68 *Quiltotex Co Ltd v Minister of Housing and Local Government* [1966] 1 QB 704, [1965] 2 All ER 913.

69 *B Aerodrome Ltd v Dell* [1917] 2 KB 380, DC.

70 *Caiger v St Mary, Islington, Vestry* (1881) 50 LJMC 59; and see *Wright v Ingle* (1885) 16 QBD 379, CA.

71 *King v Wycombe Rly Co* (1860) 28 Beav 104; *Governors of St Thomas' Hospital v Charing Cross Rly Co* (1861) 1 John & H 400; *Hewson v South Western Rly Co* (1860) 2 LT 369; *Fergusson v London, Brighton and South Coast Rly Co* (1863) 3 De GJ & Sm 653; *Pulling v London, Chatham and Dover Rly Co* (1864) 3 De GJ & Sm 661; *Steele v Midland Rly Co* (1866) 1 Ch App 275; *Low v Staines Reservoirs Joint Committee* (1900) 64 JP 212, CA; all cases decided under the Lands Clauses Consolidation Act 1845 s 92. See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 625 et seq.

72 *R v Mead, ex p Gates* (1895) 64 LJMC 169, DC; and cf *R v Slade* (1896) 65 LJMC 108, DC.

73 *HE Green & Sons v Minister of Health* [1946] KB 608 at 612 per Henn-Collins J.

74 *Elsmore v St Briavells Inhabitants* (1828) 8 B & C 461, under the repealed statute 9 Geo 1 c 22 (1722) s 7. See *R v Edgell and Smith* (1867) 32 JP 168; *R v Manning* (1871) LR 1 CCR 338.

75 *Percy Bilton Ltd v Greater London Council* [1982] 2 All ER 623, [1982] 1 WLR 794, 20 BLR 1, HL.

76 'It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it ... You may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose': *Sevenoaks, Maidstone and Tunbridge Rly Co v London, Chatham and Dover Rly Co* (1879) 11 ChD 625 at 634-635 per Jessel MR; and cf *A-G v Great Northern Rly Co* [1916] 2 AC 356, HL. In covenants in leases, to 'maintain' means to keep in substantially the same condition as at the date of the demise: *Lister v Lane and Nesham* [1893] 2 QB 212, CA.

77 *AE Farr Ltd v Ministry of Transport* (1965) 5 BLR 94 at 97, HL, per Lord Hodson, at 103 per Lord Morton of Henryton, at 109 per Lord Guest, and at 115 per Lord Pearson; see also para 8 ante. As to ICE conditions of contract see para 2 ante.

78 *Midland Rly Co v Checkley* (1867) LR 4 Eq 19 at 25 per Lord Romilly MR; *Midland Rly Co v Haunchwood Brick and Tile Co* (1882) 20 ChD 552; *Tucker v Linger* (1883) 8 App Cas 508, HL; *Glasgow Corp v Farie* (1888) 13 App Cas 657, HL; *Earl of Jersey v Neath Poor Law Union Guardians* (1889) 22 QBD 555, CA; *Ruabon Brick and Terra Cotta Co v Great Western Rly Co* [1893] 1 Ch 427, CA; *Midland Rly Co and Kettering, Thrapston, and Huntingdon Rly Co v Robinson* (1889) 15 App Cas 19, HL; *Re Todd, Birston & Co and North Eastern Rly Co* [1903] 1 KB 603, CA; *North British Rly Co v Turners Ltd* (1904) 6 F 900, Ct of Sess. See also MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) paras 12-13.

79 *Hext v Gill* (1872) 7 Ch App 699 at 719 per Sir WM James LJ.

80 *Waring v Foden* [1932] 1 Ch 276, CA.

81 *Micklethwait v Winter* (1851) 6 Exch 644.

- 82 *Wainman v Earl of Rosse* (1848) 2 Exch 800.
- 83 *A-G v Welsh Granite Co* (1887) 35 WR 617, CA.
- 84 *A-G v Salt Union Ltd* [1917] 2 KB 488.
- 85 *Scott v Midland Rly Co* [1901] 1 KB 317, DC. Cf *Waring v Foden* [1932] 1 Ch 276, CA (where gravel was not included).
- 86 *Bell v Wilson* (1866) 1 Ch App 303.
- 87 *Lytton v Great Northern Rly Co* (1856) 2 K & J 394; *Sanderson v Cockermouth and Workington Rly Co* (1849) 11 Beav 497 at 500 per Lord Langdale; affd (1850) 2 H & Tw 327, where an agreement for accommodation works provided for 'such roads, etc as may be necessary', and it was held that this meant such roads, etc as may be necessary and proper for convenient communication between the severed portions of the land.
- 88 *Leedsford Ltd v Bradford City Council* (1956) 24 BLR 45, CA.
- 89 *Wallis v Robinson* (1862) 3 F & F 307 at 309 per Martin B.
- 90 *Whittall Builders Ltd v Chester-le-Street District Council* (1987) 40 BLR 82. See also *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 29 BLR 5, CA.
- 91 *Westminster City Council v J Jarvis & Sons Ltd* [1970] 1 All ER 943 at 948-949, [1970] 1 WLR 637 at 646-647, HL, per Viscount Dilhorne; *HW Nevill (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78 at 87 per Judge Newey QC; *Emson Eastern Ltd (in receivership) v EME Developments Ltd* (1991) 55 BLR 114, (1991) 26 ConLR 57.
- 92 *Beacon Life and Fire Assurance Co v Gibb* (1862) 1 Moo PCCNS 73; *Metropolitan Water Board v Paine* [1907] 1 KB 285. See further 3 Words and Phrases (3rd Edn) 413 et seq.
- 93 *North West Metropolitan Regional Hospital Board v TA Bickerton & Son Ltd* [1970] 1 All ER 1039 at 1042, [1970] 1 WLR 607 at 610, HL, per Lord Reid. As to the nomination and renomination of sub-contractors see para 41 post.
- 94 As to the nomination and designation of suppliers see para 81 post.
- 95 See generally para 8 ante as to 'cost plus' and 'prime cost' contracts.
- 96 *Moffatt v Dickson* (1853) 13 CB 543.
- 97 *LCC v Henry Boot & Sons Ltd* [1959] 3 All ER 636, HL.
- 98 *London City v Nash* (1747) 3 Atk 512; *A-G v Hatch* [1893] 3 Ch 36 at 45, CA, per Lindley LJ. See also the cases on the meaning of the words 'rebuilding of the principal mansion house', in the Settled Land Act 1925 s 83, Sch 3 Pt I para (xxv) (see SETTLEMENTS vol 42 (Reissue) para 816); *Re De Teissier's Trusts* [1893] 1 Ch 153 and *Re Dunham Massey Settled Estates* (1906) 22 TLR 595, DC (structural alterations); *Re Lord Gerard's Settled Estate* [1893] 3 Ch 252, CA (architectural improvements); *Re Walker's Settled Estate* [1894] 1 Ch 189 and *Re Wright's Settled Estates* (1900) 83 LT 159 (partial reconstruction); *Re Windham's Settled Estate* [1912] 2 Ch 75 (addition of new wings); *Re Legh's Settled Estate* [1902] 2 Ch 274 (dry rot). As to land improvement generally see AGRICULTURAL LAND vol 1 (2008) PARA 613 et seq; SETTLEMENTS vol 42 (Reissue) paras 794, 809 et seq.
- 99 *West Faulkner Associates v Newham London Borough Council* (1994) 71 BLR 1 at 14, (1994) 42 ConLR 144 at 154, CA, per Brown LJ.
- 100 *Inglis v Buttery* (1878) 3 App Cas 552 at 373, HL, per Lord O'Hagan; *Greg v Planque* [1936] 1 KB 669 at 677, CA, per Slessor LJ. 'Repair' in the Landlord and Tenant Act 1927 s 18(1) includes 'reinstatement': *Cunliffe v Goodman* [1950] 1 KB 267, [1949] 2 All ER 946; revsd on another point [1950] 2 KB 237, [1950] 1 All ER 720, CA.
- 101 Landlord and Tenant Act 1954 s 69(1). As to covenants to repair see LANDLORD AND TENANT vol 27(1) (2006 Reissue) para 436 et seq.
- 102 *Cunliffe v Hampton Wick Local Board* (1893) 9 TLR 378, DC.

103 See *National Coal Board v William Neill & Son (St Helens) Ltd* [1985] QB 300, [1984] 1 All ER 555 (work required to be completed 'in the manner set out in the specification, if any, and to the reasonable satisfaction of the engineer'; both stipulations had to be satisfied).

104 See *Lavy v LCC* [1895] 2 QB 577, CA; *Mills and Rockleys Ltd v Leicester Corp* as reported in [1946] 1 All ER 424 at 427, DC, per Lord Goddard CJ; *Engineering Industry Training Board v Foster Wheeler John Brown Boilers Ltd* [1970] 2 All ER 616, [1970] 1 WLR 881, CA (boiler may be a structure); *British Transport Docks' Board v Williams* [1970] 1 All ER 1135, [1970] 1 WLR 652, DC (crane not a structure).

105 *Myers v Sarl* (1860) 3 E & E 306.

106 *Marks and Spencer Ltd v LCC* [1952] Ch 549, [1952] 1 All ER 1150, CA; affd sub nom *LCC v Marks and Spencer Ltd* [1953] AC 535, [1953] 1 All ER 1095, HL.

UPDATE

35-36 Implied terms, Explanation of words and phrases

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

36 Explanation of words and phrases

NOTE 104--*Engineering Industry*, cited, applied in *Daniel Contractors Ltd v Construction Industry Training Board* [2007] EWHC 2848 (Admin), [2007] All ER (D) 52 (Dec).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(5) DISCHARGE AND WAIVER/37. Rescission and modification.

(5) DISCHARGE AND WAIVER

37. Rescission and modification.

The same principles apply to the rescission and modification of contracts for works of construction as apply to other contracts¹. An agreement to rescind a contract or to modify its terms will normally be of no effect in the absence of fresh consideration². If one party simply undertakes not to dishonour one of its existing contractual obligations that in itself will not be enforceable without good consideration, but a practical benefit to the other party flowing from that affirmation of existing obligations will be good consideration for these purposes³. In a contract for work and materials where the employer has reason to doubt whether the contractor will complete his work, if the employer agrees to pay him further amounts and the contractor simply affirms his existing obligations, the contractor gives good consideration as long as the employer thereby receives a benefit or avoids a disadvantage. It is not necessary that the contractor should suffer a detriment⁴. It is a question of construction whether a subsequent agreement is intended to modify or to replace the original agreement or to be incorporated in it⁵, but clear evidence will be required before a court will find that a second agreement was intended to rescind the whole of the original contract⁶.

¹ See CONTRACT. For variations to the works, building contracts have special provisions and fresh consideration may not be necessary; see para 74 post.

² As to consideration generally see para 21 ante; and CONTRACT vol 9(1) (Reissue) para 727 et seq.

³ *Stilk v Myrick* (1809) 2 Camp 317, as affirmed and limited by *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, 48 BLR 69, CA. See also CONTRACT vol 9(1) (Reissue) para 747. Where the whole contract is rescinded by mutual agreement and parts of either party's obligations have not been performed, consideration exists.

⁴ *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, 48 BLR 69, CA.

⁵ *Macintosh v Midland Counties Rly Co* (1845) 14 M & W 548.

⁶ *Munro v Butt* (1858) 8 E & B 738, DC.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(5) DISCHARGE AND WAIVER/38. Estoppel and waiver.

38. Estoppel and waiver.

The term waiver is used in a number of situations¹:

- 47 (1) where there has been a new agreement or an accord and satisfaction which releases one party from its original obligations²;
- 48 (2) where there has been a repudiatory breach of contract and the innocent party affirms the contract³;
- 49 (3) where there are circumstances from which one party can be said to have 'accepted' defective or incomplete performance by the other party⁴;
- 50 (4) where one party promises to forego its strict contractual rights, producing a temporary suspension of those rights which may later result in an estoppel.

Where one party has promised to forego his strict contractual rights and the other party relies on that promise to his detriment, the promisor cannot go back to the original position without giving notice⁵. Where a course of dealing is inconsistent with the strict enforcement of the terms of the contract, such dealings may raise an implication that those terms inconsistent with the parties' behaviour have been waived by the party who would have benefited by them⁶. Where a course of dealing assumes one set of facts to be true, one or other party may be estopped from contradicting that assumption⁷.

Where an employer fails to pay a contractor in full and offers part payment in full satisfaction, while refusing to offer full payment, the contractor does not waive his right to sue for the balance of the money by accepting that part payment. This will be so even though the transaction in which part payment was accepted has given the contractor the real benefit of relief from financial difficulties and is therefore supported by consideration⁸.

Where one party has used economic duress to compel the other to waive its rights the agreement to waive may be voidable under general principles of contract⁹.

1 As to waiver see CONTRACT vol 9(1) (Reissue) para 1025 et seq.

2 See para 37 ante. As to accord and satisfaction see CONTRACT vol 9(1) (Reissue) para 1043 et seq.

3 As to the exercise of a power to determine see para 115 et seq post. As to affirmation see CONTRACT vol 9(1) (Reissue) paras 1010-1011.

4 See para 39 post.

5 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256; *Tool Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; *Rees & Kirby Ltd v Swansea City Council* (1985) 30 BLR 1, (1985) 5 ConLR 34, CA. See also CONTRACT vol 9(1) (Reissue) para 1030 et seq; ESTOPPEL vol 16(2) (Reissue) para 1082.

6 *Munro v Butt* (1858) 8 E & B 738, DC; *Whitaker v Dunn* (1887) 3 TLR 602, DC; *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 121-122, [1981] 3 All ER 577 at 584, CA, per Lord Denning MR, discussed in *Hiscox v Outhwaite* [1992] 1 AC 562 at 574, [1991] 3 All ER 124 at 134, CA, per Lord Donaldson, and at 583 and 142 per Leggatt LJ (affd [1992] 1 AC 562, [1991] 3 All ER 641, HL).

7 *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA.

8 *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; *Foakes v Beer* (1884) 9 App Cas 605, HL; *Pinnel's Case* (1602) 5 Co Rep 117a.

9 See *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, [1978] 3 All ER 1170; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, CA; *Huyton SA v Peter Cramer GmbH & Co* [1999] 1 Lloyd's Rep 620. As to economic duress see CONTRACT vol 9(1) (Reissue) para 711.

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39. Acceptance of defective or incomplete performance by contractor or employer.

The employer waives defective work, and the contractor waives late or incomplete payment, where the ingredients of an estoppel, accord and satisfaction, or new agreement are present, and the party in breach of its original obligations can rely on the principles previously mentioned¹.

Generally neither the employer nor his architect owes a duty to the contractor to condemn defective work promptly² and acceptance will not be implied from the fact that the employer had knowledge of the defects at the time the work was done³. The employer does not accept defective work merely by moving into occupation and making use of the building or other structure constructed under the contract⁴. Furthermore, the fact that the employer has made interim payments⁵ or paid the contractor in full does not mean that he has accepted defective work⁶. In all these circumstances, an employer has been able to maintain an action in respect of the defective work.

On the other hand, where approval of some third party is deemed conclusive under the terms of the contract, and his approval has been given, the employer has no right of action for defects in the work approved⁷.

1 See paras 37-38 ante; and CONTRACT.

2 *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789 at 809, [1968] 1 WLR 1028 at 1053 per Mocatta J.

3 *Whitaker v Dunn* (1887) 3 TLR 602, DC, per Lord Coleridge CJ.

4 *Whitaker v Dunn* (1887) 3 TLR 602, DC; *Sumpter v Hedges* [1898] 1 QB 673 at 674-675, CA, per Smith LJ; *Forman & Co Pty Ltd v The Liddlesdale* [1900] AC 190 at 204, PC; *Munro v Butt* (1858) 8 E & B 738 at 752 per Lord Campbell CJ.

5 *Cooper v Uttoxeter Burial Board* (1864) 11 LT 565.

6 *Rigge v Burbidge* (1846) 15 LJEx 309; *Davis v Hedges* (1871) LR 6 QB 687 at 690 per Hannen J.

7 *Goodyear v Weymouth and Melcombe Regis Corpn* (1865) 35 LJCP 12; *Laidlaw v Hastings Pier Co* (1874) 2 Hudson's BC (4th Edn) 13; *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 10 Const LJ 311, CA; *Matthew Hall Ortech Ltd v Tarmac Roadstone Ltd* (1997) 87 BLR 96.

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(6) SUB-CONTRACTING AND VICARIOUS PERFORMANCE

(i) Sub-contracting

40. Types of sub-contracting.

Sub-contracting by main contractors in building and engineering contracts takes four principal forms: (1) nominated sub-contracting in which the employer instructs the main contractor to employ a particular sub-contractor¹; (2) conventional sub-contracting, known as domestic sub-contracting, in which the employer has no relationship with the sub-contractor, and the obligations of the parties to the main contract are unaffected by the method by which the main contractor has chosen to perform his obligations; (3) named sub-contracting in which sub-contractors are named in the contract documents and whom the contractor is obliged to engage²; and (4) works or trade sub-contractors engaged by a management contractor³.

1 See para 41 post.

2 See the JCT intermediate form of building contract and the related standard form of named sub-contract. The arrangement is similar to nomination. Under the JCT intermediate form of building contract, nominated sub-contractors are replaced by named sub-contractors, being sub-contractors who are specifically identified in the contract documents and with whom the contractor is required to sub-contract upon a standard form of named contract. As to JCT standard forms of contract see para 2 ante.

3 See the JCT standard form of management contract and the related standard form of works contract conditions.

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41. Nomination and renomination.

Nomination provisions oblige the contractor to perform part of the works by sub-contracting to a particular named person¹. The extent to which this alters all the contractor's other obligations in relation to that part of the work will always depend on the construction of the terms relating to nomination, of the contract as a whole and all relevant surrounding circumstances. If through insolvency or some other cause the nominated sub-contractor cannot perform, some nomination provisions oblige the contractor to seek a renomination by the employer rather than perform the work himself or immediately relet it². Such inflexibility in practice causes delay and expense³. Some standard nomination provisions have been redrafted to avoid this difficulty.

1 These are to be distinguished from a requirement to obtain work, goods or services from a source specified in the contract or chosen by the contractor but approved by or on behalf of the employer: see *Leedsford Ltd v Bradford City Council* (1956) 24 BLR 45, CA.

2 *North West Metropolitan Regional Hospital Board v TA Bickerton & Son Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607, HL.

3 As to the risk of delay caused by the withdrawal of a nominated sub-contractor and the financial consequences of such renomination under a JCT contract see *Percy Bilton Ltd v Greater London Council* [1982] 2 All ER 623, [1982] 1 WLR 794, 20 BLR 1, HL; *Fairclough Building Ltd v Rhuddlan Borough Council* (1985) 30 BLR 26, (1985) 2 Const LJ 55, CA; *Fairweather & Co Ltd v Wandsworth London Borough Council* (1987) 39 BLR 106. As to JCT standard forms of contract see para 2 ante.

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42. Prohibitions on sub-contracting.

In general a contractor is entitled to arrange for vicarious performance of a building contract wherever it must be a matter of indifference to an employer whether the work is done by the immediate party or by someone on his behalf. He has no such entitlement in the following circumstances: (1) where there is an express stipulation against sub-contracting; (2) where an intention of the parties not to permit vicarious performance can be implied from the circumstances¹, as where a contractor is employed because of a particular qualification in respect of skill², financial position or the possession of special plant adapted for the work³; (3) where the work is of a special nature⁴, such as the construction of a lighthouse⁵, and where the performance required from the contractor is personal⁶, or possibly where the works require techniques special to the contractor.

1 *Robson v Drummond* (1831) 2 B & Ad 303; *Knight v Burgess* (1864) 33 LJCh 727; the contract and its circumstances must be considered as a whole: *Davies v Collins* [1945] 1 All ER 247, CA (where the construction of a clause limiting the contractor's liability was held to exclude the right to sub-contract the performance of the work). As to the assignment of rights and obligations see para 55 et seq post.

2 *Southway Group Ltd v Wolff* (1991) 57 BLR 33, CA.

3 *Knight v Burgess* (1864) 33 LJCh 727; *British Waggon Co v Lea* (1880) 5 QBD 149 at 153 per Cockburn CJ (as explained in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1019, HL, per Viscount Simon LC); *Cooper v Micklefield Coal and Lime Co Ltd* (1912) 107 LT 457; *Kollerich & Cie SA v State Trading Corpn of India* [1980] 2 Lloyd's Rep 32, CA.

4 *Johnson v Raylton, Dixon & Co* (1881) 7 QBD 438, CA.

5 *Anon* (prior to 1839), cited in *Wentworth v Cock* (1839) 10 Ad & El 42 at 45.

6 *Southway Group Ltd v Wolff* (1991) 57 BLR 33, CA.

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43. Relationship between main contractor and sub-contractor.

By sub-letting part of the work, the main contractor impliedly contracts with the sub-contractor that he will not by any act or default of his own prevent the sub-contractor from performing his share of the work. Thus if, in consequence of the default of the main contractor, the employer forfeits the main contract and ousts the sub-contractor, the sub-contractor will have a claim for damages against the main contractor¹.

The sub-contractor, on his part, is liable to the main contractor for defective work, as the relation between them is similar to that of employer and contractor². Thus where the sub-contractor is in breach of either an express or an implied term of the sub-contract and this has caused injury to a third party, the sub-contractor will be liable in contract to the contractor even if both have been held liable to the third party in tort³. The sub-contractor's liability in contract may include damages and costs that the contractor has had to pay to the third party⁴ including the employer⁵.

1 See *McBrian v Shanley* (1874) 24 CP 28 (Can).

2 As to the effect of a stipulation limiting the responsibility of the sub-contractor to the replacement of faulty work supplied by him see *Prince of Wales Dry Dock Co (Swansea) Ltd v Fownes Forge and Engineering Co Ltd* (1904) 90 LT 527, CA (where it was held that a sub-contractor denying that his work was faulty was liable to the main contractor for the costs of a counterclaim successfully raised by the employer for defects in such work). A sub-contractor may also have an implied contractual duty to warn the main contractor when it knows, or ought to know, that the works are obviously dangerous: *Plant Construction plc v Clive Adams Associates* [2000] BLR 137, sub nom *Plant Construction Ltd v JMH Construction Services Ltd* (2000) 2 TCLR 513, CA. Cf *Aurum Investments Ltd v Avonforce Ltd (in liquidation) and Knapp Hicks & Partners and Advanced Underpinning Ltd (Pt 20 defendants)* (2001) 3 TCLR 461 (no implied contractual duty to warn of the possible way in which work might be carried out).

3 *Sims v Foster-Wheeler Ltd* [1966] 2 All ER 313, [1966] 1 WLR 769, 6 BLR 39, CA, following *Mowbray v Merryweather* [1895] 2 QB 640, CA. In the former case the main contractors recovered from the sub-contractor an apportioned part of the damages awarded against them, under the Fatal Accidents Acts, to a widow whose husband was killed when staging on which he was working collapsed, the collapse being caused by the negligent work of a sub-sub-contractor. The main contractor had been found partly to blame for breach of statutory duty. The sub-contractor was found to be in breach of an implied warranty to the main contractor that the staging was fit for its purpose. See also *AMF International v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028. The terms of a sub-contract can expressly exclude any liability implied by law as to quality or fitness for purpose of the works carried out by them: *Southern Water Authority v Carey* [1985] 2 All ER 1077, sub nom *Southern Water Authority v Lewis and Duvivier (No 2)* 27 BLR 116.

4 See eg *Caister Group Developments Ltd v Paul Rackham Construction Ltd* (1973) 226 Estates Gazette 809.

5 As to liability for damages generally see DAMAGES. See, in particular, the rule in *Hadley v Baxendale* (1854) 9 Exch 341; and DAMAGES vol 12(1) (Reissue) para 1015 et seq. The second limb of the rule will be relevant, when, as is often the case, the sub-contractor has specific knowledge of the losses the contractor will suffer upon breach by the sub-contractor.

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44. Indemnity by sub-contractor.

In many sub-contracts the sub-contractor is required to indemnify the contractor against losses which the contractor may suffer and which arise out of the sub-contract work¹. An indemnity clause in the sub-contract has to be construed separately from any indemnity provisions in the main contract. The sub-contractor can be required to indemnify the contractor for loss caused partly or wholly by the fault of the contractor, but only if (1) this is expressly stated in the indemnity clause; or (2) the meaning of the words in the indemnity clause is wide enough to provide for loss caused by negligence and no loss arising without fault could reasonably be covered by the clause².

1 The main contractor's cause of action against a sub-contractor accrues on the date the loss was established: *County and District Properties Ltd v C Jenner & Son Ltd* [1976] 2 Lloyd's Rep 728. See also *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1997) 86 BLR 70 (unequivocal and clearly communicated affirmation of main contract required to prevent contractor recovering losses from sub-contractor).

2 *Smith v South Wales Switchgear Co Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL. As to contracts of indemnity see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1255 et seq. See also, in relation to building contracts, *Walters v Whessoe Ltd and Shell Refining Co Ltd* [1968] 2 All ER 816n, 6 BLR 23, CA; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028; *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep 145, 39 BLR 1, CA.

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45. How far terms of the main contract are binding on sub-contractor.

Where, in breach of contract, the sub-contractor delays the completion of the sub-contract works having known at the date of contracting that under the contract between the employer and the main contractor the main contractor is liable to liquidated damages or forfeiture for delay, the liability of the sub-contractor to the contractor for delay is increased¹. The main contractor will then be entitled to recover from the sub-contractor the damages he has had to pay owing to the delay caused by the sub-contractor, or profit he would have made on a contract rescinded from that cause, together with the cost of work thrown away².

Such knowledge of the terms of the main contract is, however, not sufficient to prove that the sub-contractor agreed with the main contractor to be bound by the terms of the contract. Thus if the sub-contractor properly completes his part of the work, his right to payment will not depend upon the certificate of the architect, notwithstanding that it is a condition precedent to payment to the main contractor³.

Where the sub-contractor expressly contracts to be bound by the terms of the main contract, provisions as to retention money will be applied to him proportionally in the ratio that his contract bears to the whole contract⁴. A sub-contractor who voluntarily and in the absence of any request from the contractor or employer undertakes extra work or uses better materials than those stipulated for has no claim against either for more than the contract price⁵.

1 *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Koufos v Czarnikow Ltd* [1969] 1 AC 350, [1967] 3 All ER 686, HL. Since a liability to pay liquidated damages is not a natural consequence of delay, the sub-contractor without knowledge will be liable for such damages as he should have contemplated as a serious possibility, or not unlikely, resulting from his breach. See further DAMAGES.

2 *Hydraulic Engineering Co Ltd v McHaffie* (1878) 4 QBD 670, CA. If the main contractor compromises the employer's claim arising from the sub-contractor's breach, the amount paid in settlement is admissible prima facie evidence of the amount of loss and damage caused by the sub-contractor, although liability would still need to be established: see eg *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, [1951] 2 All ER 191, CA.

3 *Lewis v Hoare* (1881) 44 LT 66, HL. However, the sub-contract often provides that the payment of the sub-contractor for any work only becomes due when the contractor receives the certificate which values that work: see eg *Dunlop & Ranken Ltd v Hendall Steel Structures Ltd* [1957] 3 All ER 344, [1957] 1 WLR 1102. See also *Southern Water Authority v Carey* [1985] 2 All ER 1077, sub nom *Southern Water Authority v Lewis and Duvivier (No 2)* 27 BLR 116. See also para 46 post.

Some sub-contracts provide that the sub-contractor's right to payment does not arise until the main contractor has been paid the sum due by the employer. However, where such a sub-contract is construction contract under the Housing Grants, Construction and Regeneration Act 1996 (see para 9 ante), a provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent (see s 113(1); and para 159 post).

4 *Geary, Walker & Co Ltd v Lawrence & Son* (1906) 2 Hudson's BC (4th Edn) 382, CA.

5 *Ashwell and Nesbit Ltd v Allen & Co* (1912) 2 Hudson's BC (4th Edn) 462.

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46. Incorporation of terms of main contract by agreement.

An agreement by a sub-contractor to carry out work in accordance with the terms of the main contract does not necessarily incorporate all the relevant terms of the main contract into the sub-contract¹. Thus when a sub-contract expressly incorporated some of the terms of the main contract but not the term empowering the employer to require the contractor to dismiss a sub-contractor, it was held that the term could not be implied in the sub-contract so as to put an end to the contract between the contractor and the sub-contractor on the exercise by the employer of his power, although the sub-contractor had knowledge of the terms of the main contract when he entered into the sub-contract².

Provisions in the main contract, which are not applicable as between the contractor and sub-contractor, will not be incorporated by implication in the sub-contract³. Although ultimately a question of the construction of the relevant contractual material, a clause in the principal contract referring disputes between the employer and contractor to arbitration will not necessarily be incorporated so as to refer disputes between the contractor and the sub-contractor to arbitration⁴. But where the terms of the main contract are expressly incorporated in the sub-contract, the provision as to arbitration will apply⁵.

1 *Aughton Ltd v MF Kent Services Ltd* (1991) 57 BLR 1, CA; *Lexair Ltd v Edgar W Taylor Ltd* (1993) 65 BLR 87.

2 *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179, CA. As to implied terms generally see CONTRACT vol 9(1) (Reissue) para 778 et seq.

3 *Brightside Kilpatrick Engineering Services v Mitchell Construction (1973) Ltd* [1975] 2 Lloyd's Rep 493, 1 BLR 62, CA.

4 *Goodwins, Jardine & Co v Brand* (1905) 7 F 995, Ct of Sess; *Aughton Ltd v MF Kent Services Ltd* (1991) 57 BLR 1, CA; *Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd* (1993) 37 ConLR 84, CA; *Lexair Ltd v Edgar W Taylor Ltd* (1993) 65 BLR 87; *Extrudakerb (Maltby Engineering) Ltd v Whitemountain Quarries Ltd* [1996] NI 567. See also *Roche Products Ltd v Freeman Process Systems Ltd* (1996) 80 BLR 102; *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership (a firm)* (1998) 65 ConLR 11. All of these cases concern the incorporation of arbitration clauses. It must be shown that the parties had a clear intention to incorporate the arbitration clause particularly when the clause is not specific to the subject contract. As to arbitration clauses see para 199 et seq post.

5 *Modern Building Wales Ltd v Limmer & Trinidad Co Ltd* [1975] 2 All ER 549, [1975] 1 WLR 1281, CA.

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47. Relationship between employer and sub-contractor: no privity of contract.

There is no privity of contract between the employer and the sub-contractor¹ or between the architect and the sub-contractor², although the employer or his architect often nominates the sub-contractor under the provisions of the main contract. The employer may, however, secure a direct warranty from a sub-contractor³. When a nominated sub-contractor subsequently repudiates his contract with the main contractor, there is an implied term of the main contract that the employer or his architect will nominate a replacement⁴. If the sub-contractor is ordered directly by the employer to do work, the employer must pay him for it⁵. If the sub-contractor claims against the employer for work done as extra to the main contract, he must show that the work does not form part of the main contract, but is a distinct contract with the employer to do the work for which the action is brought⁶. However, it is possible for an employer and sub-contractor to make a collateral contract if the employer warrants that the sub-contractor will be paid⁷, or the sub-contractor gives a warranty in consideration of the letting of the sub-contract to him⁸. Acceptance by the employer of work done by a sub-contractor will in no way bring about an implication that the employer has made any contract with the sub-contractor⁹. A sub-contractor has no lien upon the money payable under a building contract to the contractor by the employer for the price of goods supplied by the sub-contractor the property in which has passed to the contractor¹⁰. Conversely, the employer may acquire no property in materials supplied by a sub-contractor even if he has paid the main contractor for them if, by the terms of the sub-contract, property has not passed to the main contractor¹¹. Where the sub-contractor is liable to compensate the contractor for inferior work or defects in the work supplied by him, and the contractor is under a similar liability to the employer, the employer can take an assignment of the contractor's right to compensation and proceed against the sub-contractor¹².

1 *Hampton v Glamorgan County Council* [1917] AC 13, HL; *Vigers Sons & Co Ltd v Swindell* [1939] 3 All ER 590; *Leslie & Co Ltd v Managers of Metropolitan Asylums District* (1901) 68 JP 86, CA. In certain circumstances, a person who is not a party to a contract may in his own right enforce a term of such a contract: see the Contracts (Rights of Third Parties) Act 1999; and CONTRACT.

2 *Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 67 LGR 395.

3 See eg *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, 41 BLR 43, CA, where the effect of such a warranty was to restrict the sub-contractor's liability for negligence causing economic loss.

4 *North West Metropolitan Regional Hospital Board v TA Bickerton & Sons Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607, HL (if the contractor himself completes the sub-contractor's work he is entitled to remuneration on a quantum meruit and is not restricted to the prime cost sum in the bill of quantities).

5 *Wallis v Robinson* (1862) 3 F & F 307; and see *Bramah v Lord Abingdon* (circa 1810) cited in *Paterson v Gandesequi* (1812) 15 East 62 at 66 per Lord Ellenborough.

6 *Eccles v Southern* (1861) 3 F & F 142. As to variations and extras see para 74 post.

7 By so doing an employer may enter a contract of guarantee or indemnity with the sub-contractor.

8 *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102; *Shanklin Pier Co v Detel Products Ltd* [1951] 2 KB 854, [1951] 2 All ER 471; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 QB 170, [1964] 1 All ER 41. As to collateral contracts see CONTRACT vol 9(1) (Reissue) para 753.

9 *Bramah v Lord Abingdon* (circa 1810) cited in *Paterson v Gandesequi* (1812) 15 East 62 at 66 per Lord Ellenborough. The sub-contractor needs to establish the nature of the transaction which led to the work being carried out.

10 *Pritchett and Gold and Electrical Power Storage Co v Currie* [1916] 2 Ch 515, CA (in which the earlier case of *Bellamy v Davey* [1891] 3 Ch 540 was doubted and distinguished). In the later case the lien was claimed upon money paid into court by the employer in an action brought by the sub-contractor for money due under the main contract. As to lien generally see LIEN. As to when property in goods sold passes to the purchaser see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 140 et seq.

11 *Dawber Williamson Roofing Ltd v Humberside County Council* (1979) 14 BLR 70; cf *Archivent Sales and Developments Ltd v Strathclyde Regional Council* (1984) 27 BLR 98, 1985 SLT 154, Ct of Sess.

12 *Constant v Kincaid & Co* (1902) 4 F 901, Ct of Sess. As to obligations as to workmanship and materials see para 76 post.

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48. Duty of care of sub-contractor.

Whether a sub-contractor owes a duty of care to an employer is determined by reference to the general law of negligence¹. To establish a claim in negligence the employer would also have to establish the other essential ingredients of the tort². Economic loss, absent a relevant contractual duty, is not recoverable in tort unless there exists a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the claimant from economic loss³, save where it is consequential upon physical damage in respect of which a duty of care is owed⁴.

The scope of any duty may be circumscribed by a contractual matrix which places certain risks on the employer, to the extent of exempting the sub-contractor from liability, even though there is no privity between the two⁵.

The employer owes the sub-contractor the common duty of care⁶ in any case where he remains an occupier⁷.

¹ See para 166 post; and NEGLIGENCE.

² I.e: (1) that the sub-contractor had fallen below the required standard of care; (2) causation; and (3) foreseeability of the type of damage claimed: see NEGLIGENCE. An employer would need to establish an assumption of responsibility by the sub-contractor and reliance by the employer: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL. Whether a duty of care will be imposed will depend upon proximity, foreseeability of damage and whether it is fair, just and reasonable to impose the duty contended for: see *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, Aust HC; *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, sub nom *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*, *The Nicholas H* [1995] 3 All ER 307, HL; and see NEGLIGENCE vol 78 (2010) PARA 4.

³ *Murphy v Brentwood District Council* [1991] 1 AC 398 at 475, [1990] 2 All ER 908 at 925, HL, per Lord Bridge of Harwich. 'There may, of course, be situations where, even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss': *Murphy v Brentwood District Council* supra at 481 and 930 per Lord Bridge of Harwich. As to pure economic loss see NEGLIGENCE vol 78 (2010) PARA 13.

⁴ See *SCM (United Kingdom) Ltd v WJ Whittal & Son Ltd* [1971] 1 QB 337; [1970] 3 All ER 245, CA; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27; [1972] 3 All ER 557, CA; *Huntingdon Fastners Co Ltd v Avon Lippiat Hobbs (Contracting) Ltd* (1995) 13 Const LJ 267; *Londonwaste Ltd v Amec Civil Engineering Ltd* (1997) 83 BLR 136, (1997) 53 ConLR 66.

⁵ *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA; *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, 41 BLR 43, CA (sub-contractor's liability in negligence causing economic loss effectively excluded by the existence of a direct warranty between the sub-contractor and the employer); *Southern Water Authority v Carey* [1985] 2 All ER 1077, sub nom *Southern Water Authority v Lewis and Duvivier (No 2)* 27 BLR 116.

⁶ See the Occupiers' Liability Act 1957 s 2(1); and NEGLIGENCE vol 78 (2010) PARA 29 et seq. The 'common duty of care' is the duty of an occupier to take such care as is in all the circumstances reasonable to see that a visitor is reasonably safe in using the premises for the purposes for which he is invited by the occupier to be there: see s 2(2); and NEGLIGENCE vol 78 (2010) PARA 32. It is provided by s 2(4)(b) that if the damage is caused by 'a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor

and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done': see NEGLIGENCE vol 78 (2010) PARA 35. See *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028 where the employer was unable to avail himself of the Occupiers' Liability Act 1957 s 2(4) when the property of one direct contractor was damaged by the failure of another independent contractor to take proper precautions against flooding and this failure had not been detected by the employer's architect.

7 *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, HL. Cases where 'occupier' has been construed in relation to building works are *Savory v Holland, Hannen and Cubitts (Southern) Ltd* [1964] 3 All ER 18, [1964] 1 WLR 1158, CA; *Fisher v CHT Ltd (No 2)* [1966] 2 QB 475, [1966] 1 All ER 88, CA; *Kearney v Eric Waller Ltd* [1967] 1 QB 29, [1965] 3 All ER 352; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028; *Bunker v Charles Brand & Son Ltd* [1969] 2 QB 480, [1969] 2 All ER 59. See further NEGLIGENCE vol 78 (2010) PARA 29 et seq.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(6) SUB-CONTRACTING AND VICARIOUS PERFORMANCE/(i) Sub-contracting/49. Limitations on employer's right to pay sub-contractor.

49. Limitations on employer's right to pay sub-contractor.

In general, the employer cannot discharge his liability to the contractor by paying the sub-contractor. In case of the bankruptcy of the contractor, the architect cannot deduct a payment made to a sub-contractor for work and materials supplied by him from the balance certified as due to the main contractor, but may be compelled to certify payment to the main contractor without such deduction¹. A wide provision that in the event of the main contractor unduly delaying proper payment to the sub-contractors the employer may pay them himself, has been held to justify the employer in paying the sub-contractors when the contractor has unduly delayed proper payment to the sub-contractors by presenting his petition in bankruptcy. Such a provision is useful and justifiable in circumstances other than insolvency², but even a provision of such general effect may not discharge the employer's liability to the contractor's trustee in bankruptcy, since in the context of bankruptcy and insolvency the court will refuse to give effect to it³.

A condition in a contract which enables a building owner to pay someone other than the contractor must be strictly construed⁴. If the contract authorises payment either to the contractor or alternatively directly to the sub-contractors appointed by the architect, the building owner may elect which right to exercise. If he elects to pay the contractor amounts including sums owing for work done by the sub-contractors, he may not in the case of future payments be permitted to pay the sub-contractors direct and deduct such payments from sums owing to the contractor if it turns out that the contractor has not paid over to the sub-contractors the amount owed to them⁵. This, however, will depend upon the construction of the contract terms⁶.

1 *Re Holt, ex p Gray* (1888) 58 LJQB 5, DC.

2 See the JCT standard form of contract which permits direct payment subject to detailed conditions but expressly states that such a clause ceases to have effect upon the contractor's insolvency. As to JCT standard forms of contract see para 2 ante.

3 *Re Wilkinson, ex p Fowler* [1905] 2 KB 713 and *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178, support the efficacy of such clauses; however, in *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL, it was held that clauses which contracted out of the *pari passu* principle of the insolvency legislation were contrary to public policy and would be overridden by the general rules of the liquidation, even if the clauses were agreed for good business reasons and with no intention to circumvent the insolvency legislation. See also *B Mullan & Sons (Contractors) Ltd v Ross* (1996) 86 BLR 1, (1996) 54 ConLR 163, NI CA (which distinguished *Re Wilkinson, ex p Fowler* supra and *Re Tout and Finch Ltd* supra, and followed *British Eagle International Airlines Ltd v Cie Nationale Air France* supra). See also *Re Right Time Construction Co Ltd* (1990) 52 BLR 117, HK CA.

4 *Milestone & Sons Ltd v Yates Castle Brewery Ltd* [1938] 2 All ER 439 at 443 per Singleton J.

5 *British Steamship Investment Trust Ltd v Foundation Co Ltd* (15 December 1930, unreported) per Maugham J, cited in *Milestone & Sons Ltd v Yates Castle Brewery Ltd* [1938] 2 All ER 439 at 442-443.

6 See *Hobbs v Turner* (1902) 18 TLR 235, CA, where under the main contract either the employer or the contractor could make payment to a sub-contractor and it was held that a sub-contractor could look to the employer for payment rather than to the contractor since his instructions had come from the architect and the architect had certified payment against the employer.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(6) SUB-CONTRACTING AND VICARIOUS PERFORMANCE/(i) Sub-contracting/50. When employer liable to sub-contractor.

50. When employer liable to sub-contractor.

There may be communications or dealings between the employer and the sub-contractor which amount to a contract, express or implied, on the part of the employer to pay the sub-contractor¹. If there is a promise by the employer to pay or see that the sub-contractor is paid, the question arises whether the promise is collateral to the contract between the contractor and the sub-contractor, and given by way of guarantee, in which case it must be in writing², or whether it is a direct promise to pay, in which case an oral promise is sufficient³.

If the employer promises to pay the sub-contractor 'out of the money' that he has to pay to the main contractor, that is a direct promise, and not a guarantee to be liable for the main contractor's debt⁴.

Where it appears that the main contractor was acting as the agent of the employer in contracting with the sub-contractor, the employer will be liable to the latter. The burden of proof lies on the sub-contractor to show that the employer, and not the main contractor, was the real principal, and he may call evidence to show that the employer personally gave orders to do work and supply materials for the same building to third parties as corroboration of his evidence that the employer gave him personal orders to do the work⁵; but the employer can prove that on the accounts between the principal contractor and the sub-contractor nothing is due to the latter⁶.

The allowance in a lump sum contract of a provisional sum does not raise any presumption that the employer and not the contractor is responsible as principal for the payment of the person who supplies the goods to which the prime cost item refers⁷. Where it appears from the terms of a written contract that the main contractor or other alleged agent contracted personally, extrinsic evidence is not admissible to show that it was intended that he should not be liable⁸.

1 *Smith v Rudhall* (1862) 3 F & F 143.

2 See para 33 ante; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1052 et seq.

3 See CONTRACT vol 9(1) (Reissue) para 620.

4 *Dixon v Hatfield* (1825) 2 Bing 439; *Andrews v Smith* (1835) 2 Cr M & R 627; *Stevenson's Trustee v Campbell & Sons* (1896) 23 R 711, Ct of Sess.

5 *Woodward v Buchanan* (1870) LR 5 QB 285; and see AGENCY vol 1 (2008) PARA 121 et seq.

6 *Gerish v Chartier* (1845) 1 CB 13.

7 *Hampton v Glamorgan County Council* [1917] AC 13, HL, in which the contrary view expressed by Channell J in *Crittall Manufacturing Co v LCC and March* (1910) 75 JP 203, and followed in *Young & Co Ltd v White* (1911) 76 JP 14, was negated. See para 36 ante as to the meaning of 'prime cost' and 'provisional sums'.

8 *Sika Contracts v Gill* (1978) 9 BLR 11. As to the admissibility of extrinsic evidence as an aid to construction see para 34 ante; and CONTRACT vol 9(1) (Reissue) paras 622, 690; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 185 et seq.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(6) SUB-CONTRACTING AND VICARIOUS PERFORMANCE/(i) Sub-contracting/51. Relationship between sub-contractors.

51. Relationship between sub-contractors.

There is no contractual relationship between two or more sub-contractors of the same main contractor, whether the sub-contractors are nominated or not. However, two sub-contractors can be held jointly liable in tort for injuries suffered by a third party even if the third party is an employee of one of the sub-contractors¹. Similarly a sub-contractor liable in respect of any damage suffered by another can claim contribution from another sub-contractor who is liable in respect of the same damage if both are or could be held to be tortfeasors, or if they are both liable in contract, or for breach of trust, or otherwise².

1 *McArdle v Andmac Roofing Co* [1967] 1 All ER 583, [1967] 1 WLR 356, CA.

2 See the Civil Liability (Contribution) Act 1978 ss 1, 6(1); and TORT vol 97 (2010) PARA 450.

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52. Effect of sub-contracting on main contractor's obligations to perform.

In general a main contractor who sublets part of the works with the tacit consent of the employer does not thereby alter his obligations to the employer. The contractor will be liable for defects in or delay in carrying out such work in the same way and to the same extent as if he had performed it himself¹ unless the terms of the main contract or the surrounding circumstances show otherwise.

However, where the employer has instructed the main contractor to perform by subletting part of his work to a particular sub-contractor, the main contractor's obligation to the employer in respect of defects or non performance may be simply to use his rights under the sub-contract to compel proper performance from the sub-contractor, or compensation for non performance. He may have no obligation to undertake the works himself or remedy defects in them². Terms in the main contract giving the employer control over the nomination of sub-contractors and the terms of the sub-contract may exclude or reduce the contractor's obligations in respect of workmanship and materials³.

1 *British Waggon Co v Lea* (1880) 5 QBD 149. See also *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, HL, where *British Waggon Co v Lea* supra was explained by reference to the distinction between vicarious performance and assignment.

2 *North West Metropolitan Regional Hospital Board v TA Bickerton & Son Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607, HL. Although the main contractor may be liable for the acts and omissions of a nominated sub-contractor he will not ordinarily be liable for the consequences of delayed nomination or renomination.

3 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL; *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181, HL. Ultimately, it is a question of construction of the terms of each contract concerned whether and, if so, to what extent, the liability of the main contractor is affected by the nomination procedure.

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53. Labour only sub-contracting.

The common law distinguishes between the status of an employee employed under a contract of service, and the status of a self-employed person offering services to customers under a contract for services. The contractual and other duties owed to the employee are more numerous and onerous. Statutory provisions relating to taxation, health and safety, and employment protection adopt the distinction and incorporate it¹. The distinction is therefore fundamental to all rights and liabilities relating to labour.

The distinction is complicated in the construction industry by the existence of sub-contractors whose only function is to provide labour.

No simple test exists to classify employment contracts. The nature of the relationship should be judged by weighing the terms of the contract which point one way or the other². Considerations supported by authority are: whether the alleged employee is under the control of the employer when carrying out his duty³, whether the individual is in business on his own⁴, ownership of tools or plant and the risk of loss and gain⁵. The label put on the contract by the parties, and the intentions of the parties, should be considered but cannot be conclusive⁶. Whether or not a person is an employee or self-employed is a mixed question of law and fact, possibly involving consideration of each term of the contract, and the decision of a court at first instance will not be overturned unless there was no evidence for its conclusion⁷.

The labour only sub-contractor has the same statutory and common law duties to his employees as any other employer. Therefore for purposes other than taxation, once the proper employer has been identified the fact that he may be a labour only sub-contractor does not of itself alter the nature of his rights and obligations. However, an employer who employs small firms of sub-contractors for building work may assume a duty to provide proper supervision towards the sub-contractors' employees⁸.

1 See HEALTH AND SAFETY AT WORK; INCOME TAXATION; EMPLOYMENT.

2 *Mersey Docks and Harbour Board v Coggins & Griffith Liverpool Ltd* [1947] AC 1, [1946] 1 All ER 345, HL. For the tests as to whether a person is a sub-contractor or employee see *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817, [1976] 1 WLR 1213, CA; *Calder v H Kitson Vickers & Sons (Engineers) Ltd* [1988] ICR 232, CA.

3 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, [1968] 1 All ER 433.

4 *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, [1968] 3 All ER 732.

5 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1, [1946] 1 All ER 345, HL.

6 *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676, CA; *Warner Holidays Ltd v Secretary of State for Social Services* [1983] ICR 440.

7 *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 QB 139, [1971] 3 All ER 385; *O'Kelly v Trusthouse Forte plc* [1984] QB 90, [1983] 3 All ER 456, CA. See also *Byrne Bros (Formwork) Ltd v Baird* [2002] IRLR 96, EAT.

8 *McArdle v Andmac Roofing Co* [1967] 1 All ER 583, [1967] 1 WLR 356, CA.

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54. Tax provisions applicable to contractors and sub-contractors.

Special tax provisions apply to sub-contractors in the construction industry¹, and this regime is known as the Construction Industry Scheme.

Where a contractor makes a payment to a sub-contractor under a contract, other than a contract of employment, relating to construction operations, the contractor must deduct and pay a percentage of the payment on account of tax². If, however, the sub-contractor can show that he is able to meet his tax and social security obligations, he will be issued with a sub-contractor's tax certificate³. Upon production of this certificate to the contractor, payment may be made without deduction⁴.

1 See the Income and Corporation Taxes Act 1988 Pt XIII Ch IV (ss 559-567) (as amended); the Income Tax (Sub-contractors in the Construction Industry) Regulations 1993, SI 1993/743 (as amended); and INCOME TAXATION vol 23(1) (Reissue) para 804 et seq.

2 See the Income and Corporation Taxes Act 1988 s 559 (as amended); and INCOME TAXATION vol 23(1) (Reissue) para 809 et seq.

3 See ibid ss 561, 562, 564, 565 (all as amended); the Income Tax (Sub-contractors in the Construction Industry) Regulations 1993, SI 1993/743 (as amended); and INCOME TAXATION vol 23(1) (Reissue) para 804 et seq.

4 See ibid s 561 (as amended); the Income Tax (Sub-contractors in the Construction Industry) Regulations 1993, SI 1993/743 (as amended); and INCOME TAXATION vol 23(1) (Reissue) para 804 et seq.

UPDATE

54 Tax provisions applicable to contractors and sub-contractors

TEXT AND NOTES--These provisions are replaced by the construction industry scheme established by the Finance Act 2004 Pt 3 Ch 3 (ss 57-77). SI 1993/743 replaced by Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005/2045 (see INCOME TAXATION vol 23(1) (Reissue) PARA 809-834).

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(ii) Assignment of Rights and Obligations

55. Assignment of rights in general.

The same considerations apply to the assignment of rights under building and engineering contracts as to the assignment of rights in general¹. Thus to create a legal assignment notice in writing of the assignment must be given to the debtor, or other person liable to make the payment, in order to entitle the assignee to bring an action for the money or the debt, and the rights of the assignee are subject to all equities having a priority over the rights of the assignor².

Most building and engineering contracts contain express clauses dealing with assignment, for example clauses which forbid the assignment of rights under the contract without consent, and clauses which expressly permit the assignment of warranties or 'guarantees' in certain circumstances. Such clauses will be effective to modify or exclude the rights of the parties under the general rules set out below³.

1 For a detailed treatment of the legal and equitable assignment of rights see CHOSER IN ACTION. As to the assignment of arbitration clauses see para 201 post.

2 See the Law of Property Act 1925 s 136; and CHOSER IN ACTION vol 13 (2009) PARA 72 et seq.

3 See eg *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd* [1999] 2 AC 1, [1998] 1 All ER 218, HL; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, sub nom *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97, HL; and para 56 et seq post.

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56. Assignment of benefit by the contractor.

The contractor can assign his beneficial rights under the contract and these rights include the right to receive payment of money due or to become due whether by instalments or otherwise¹, the right to payment of instalments of the agreed price on the production of certificates from the architect and the right to any retention money held by the employer². When a contract prohibits assignment, an assignment of the benefit of that contract is of no effect and therefore unenforceable against the debtor, although it may create rights as between assignor and assignee³. Such a prohibition may also prevent the assignment of the fruits of performance such as accrued rights of action or debts⁴.

1 *Re Toward, ex p Moss* (1884) 14 QBD 310, DC; *Hughes v Pump House Hotel Co* [1902] 2 KB 190, CA; *G and T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 758, CA; *Re Warren, Wheeler v Trustee in Bankruptcy* [1938] Ch 725, [1938] 2 All ER 331, DC.

2 *Drew & Co v Josolyne* (1887) 18 QBD 590, CA; *G and T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 758, CA; *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178. As to instalment payments see para 148 post; as to retention money see para 149 post.

3 *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL.

4 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL. 'The question in each case must turn on the terms of the contract in question': *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* supra at 105 and 429 per Lord Browne-Wilkinson. A prohibition on the assignment of accrued rights of action under a JCT standard form is not void as being contrary to public policy: see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* supra. As to JCT standard forms of contract see para 2 ante. If a contract contains a general prohibition against assignment but permits the assignment of any sum due or to become due under it, claims for damages falling to be assessed in accordance with the terms of the contract are non-assignable, though there may be an assignment once liability and the amount of damages have been established: *David Charles Flood v Shand Construction Ltd* (1996) 81 BLR 31, (1996) 54 ConLR 125, CA. See also *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107, (1992) 32 ConLR 112 (non-assignability of right to arbitration even though sums payable under the contract assignable). See also *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, sub nom *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97, HL.

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57. Effect of forfeiture.

Where the contract is properly determined by the employer, either because of repudiation by the contractor or by virtue of the proper exercise by the employer of a determination clause in the contract, the contract is never completed and no right to further payment ever accrues to the contractor. There is therefore nothing on which an assignment of the right to money yet to become due can operate¹. However, the determination clause may provide that the contractor be paid any balance left after the deduction of the employer's damages and expenses. An assignment by the contractor of money to become due to him would cover such a sum².

1 *McMahon Ltd v O'Neill* (1915) 49 ILT 129.

2 Subject, of course, to any contractual prohibition against assignment: see para 56 ante. Whether upon a determination the assignee has a claim against the assignor will depend upon the terms of the assignment: see *Humphreys v Jones* (1850) 20 LJ Ex 88. As to the determination of a building contract see para 115 et seq post.

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58. Assignment of burden of contract by the contractor.

The contractor cannot assign the burden of his contract without the assent of the employer¹.

Where the contract would otherwise not be assignable, if the employer acquiesces in the assignment and accepts the services of the assignee, he will be estopped from raising any objection on the ground that the contract ought to have been carried out by the original contractor, and this will be so even where there is no formal assignment, substituted contract or sub-contract².

If the consideration for the assignment as between assignor and assignee is the payment of money to the assignor on completion, then, if the assignee prevents the completion of the contract or enters into a substituted contract so that the event on which the money may have become payable never happens, the assignor will have no claim for the money³; but he may have a claim in damages against the assignee.

1 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668, CA, per Collins MR; affd [1903] AC 414 (where the House of Lords upheld the assignment on the grounds that it dealt with the benefit and not the burden of the contract).

2 *Falle v Le Sueur and Le Huguel* (1859) 12 Moo PCC 501.

3 *Humphreys v Jones* (1850) 5 Exch 952.

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59. Assignment by employer of burden.

An employer can assign the benefits and burdens of a contract, as between himself and his assignee, but cannot by such an assignment relieve himself of his obligations to the contractor. The contractor may, however, be a party to the assignment, in which case the assignment operates not only as an assignment between the employer and the assignee, but also as a new contract between the assignee and the contractor, involving novation¹.

The employer cannot get rid of his liability to pay the price to the contractor by assignment without the consent of the latter. The contractor cannot be compelled to carry out a building contract with all its onerous conditions and then have to rely for payment on a person with whom he never contracted and who may be a man of straw².

If on an assignment by the employer the contractor refuses to go on with the works, and is then induced to do so by a promise by the assignee to pay him, the performance of the works would be a sufficient consideration to support the promise, and the contractor would have a right of action against the assignee, at all events for all work done subsequently to the promise³.

¹ As to assignment of a contract see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL. As to the effect of novation see para 61 post.

² *Robson v Drummond* (1831) 2 B & Ad 303 at 307 per Lord Tenterden CJ.

³ *Scotson v Pegg* (1861) 6 H & N 295; *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154, [1974] 1 All ER 1015, PC.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/1. CREATION AND NATURE OF BUILDING CONTRACTS/(6) SUB-CONTRACTING AND VICARIOUS PERFORMANCE/(ii) Assignment of Rights and Obligations/60. Assignment by employer of benefit.

60. Assignment by employer of benefit.

Two types of benefit may be assigned by the employer under a building contract. First, he may assign the right to call on the contractor to carry out or complete the works. Such an assignment is invalid if the contractor's obligations depend to any extent on the particular requirements of the employer¹, as may frequently be the case in contracts to build on a particular site, or in contracts which provide a mechanism for varying the scope of the works in accordance with those requirements. The benefit of such obligations is incapable of assignment. In practice, assignment of the right to obtain performance of the works by the contractor is often made subject to the contractor's consent by an express provision in the contract².

Second, the employer may after completion or partial completion assign the benefit of warranties in respect of the works made by the contractor, unless those warranties are of a kind incapable of assignment by reason of the principles set out above. Such assignments may for example transfer to a new owner of a building the protection of warranties made to the vendor when the building was built or repaired. Where a contract contains a general clause of the usual kind forbidding assignment of the employer's rights, another clause often permits assignment of a particular warranty. Such an assignment is valid and enforceable against the contractor if the warranty is of a kind capable of assignment. If the warranty includes an assignable obligation on the contractor to return to rectify defects, then the assignee can enforce that promise by action if necessary, and no special difficulties arise. If the warranty is simply a promise that at the time of building the work was not defective, then the assignee may only be able to recover in respect of loss actually suffered by the assignor, or in respect of loss which would have been suffered by the assignor if the assignor still owned both the building and the benefit of the warranty³.

¹ *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414, HL; *Kemp v Baerselman* [1906] 2 KB 604, CA.

² See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL, where a restriction against assignment without written consent was confirmed as prohibiting the assignment of the benefit of the contract both as to the right to future performance and the right to accrued benefits under the contract (although, in this case, it was held that the assignor was entitled to recover substantial damages on the basis that the parties were to be treated as having entered into the contract on the footing that the assignor would be entitled to enforce contractual rights for the benefit of those who suffered from defects in performance but who, under the terms of the contract, could not acquire any right to hold the contractor liable for breach). See also *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, sub nom *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97, HL.

³ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260, CA.

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(iii) Novation and New Agreement

61. Effect of novation.

The introduction of a new party into a contract, either by substitution or by addition, is termed novation¹. When a new party is substituted for the original party, the original party is, to an extent depending on the terms of the new contract, released from further performance of the original contract, and the new party will take the benefit of any period of limitation that has accrued to the advantage of the original party². Where a new contractor is substituted for the original one and takes over the work on the terms of the original contract, he will be bound by stipulations therein relating to deduction of liquidated damages³. If a contractor consents to the employer assigning the burden of the contract (that is, the liability to make payment under it), there is effectively a novation so that the original employer will be released from his obligations and the new employer will take his place⁴. When the original parties enter into a new contract, only those stipulations of the old contract which would necessarily apply will be implied into the new contract; any special terms from the old contract can only be included in the new contract by express incorporation⁵.

1 For a full explanation of novation see CONTRACT vol 9(1) (Reissue) para 1036 et seq.

2 *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 All ER 143, [1969] 1 WLR 1, CA. As to limitation periods generally see LIMITATION PERIODS.

3 *Re Yeadon Waterworks Co and Wright* (1895) 72 LT 538.

4 See CONTRACT vol 9(1) (Reissue) para 1036 et seq.

5 Eg terms providing for liquidated damages (*Kemp v Rose* (1858) 1 Giff 258 at 266); or terms giving remedies on forfeiture (*Hunt v South Eastern Rly Co* (1875) 45 LJQB 87, HL).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(1) DUTY TO COMPLETE THE WORKS/(i) In general/62. Duty to complete.

2. PERFORMANCE OF THE CONTRACT

(1) DUTY TO COMPLETE THE WORKS

(i) In general

62. Duty to complete.

Most contracts provide that the contractor is to carry out and complete the works described in the contract. Even where it is not so stated then, if the extent of the work is defined, a duty to complete the work is implied, the contractor having a correlative right to complete the work. Without a right to omit part of the work contracted for the employer cannot, without breaking the terms of the contract, carry out any part of the contract works himself¹ or, it seems, exercise a power to omit to have the work carried out by another².

¹ As to the employer's power to vary the contract by omitting part of the works see para 74 post.

² *Simplex Floor Furnishing Appliance Co v Duranceau* [1941] 4 DLR 260 (Can); *Carr v JA Berriman Pty Ltd* (1953) 27 ALJ 273; *Main Roads Comr v Reed Stuart Pty Ltd* (1974) 48 ALJR 461, (1974) 12 BLR 55; *Amec Building Ltd v Cadmus Investment Co Ltd* (1996) 51 ConLR 105, (1996) 13 Const LJ 50.

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63. Extent of the obligation.

The obligation to complete includes an obligation to provide anything which is indispensably necessary to complete the work¹. This may include work not mentioned in the contract², work inaccurately described in the drawings, specification or bill of quantities³, work required to overcome unforeseen problems in the ground⁴ or in the method of working⁵ and work required to obtain the satisfaction of the architect where that is a contractual criterion⁶. Whether the contractor is responsible for the design of the building or engineering works depends on the terms of the contract. Where the contractor has undertaken that the works will be fit for a particular purpose⁷, there is no completion if the work is useless and the employer is not bound to pay for a building which is not fit for its purpose⁸. Where the contractor merely undertakes to carry out work in accordance with drawings or bills of quantities or a specification, he must complete the work as shown in those documents and it is immaterial that the completed work may be unsuitable for its purpose⁹. However, there is no implied warranty on behalf of the employer that the design as shown on the drawings or in the specification is practicable¹⁰. Accordingly the contractor cannot excuse a failure to complete on the ground that the employer refused to make an additional payment for work necessary to realise the design¹¹, nor can the contractor claim additional payment, in the absence of a variation order¹², for work necessary to achieve completion¹³.

1 *Williams v Fitzmaurice* (1858) 3 H & N 844; *Sharpe v San Paulo Rly* (1873) 8 Ch App 597.

2 See *Williams v Fitzmaurice* (1858) 3 H & N 844.

3 See the cases cited in note 1 supra.

4 *Bottoms v York Corpn* (1892) 2 Hudson's BC (4th Edn) 208, CA.

5 *Thorn v London Corpn* (1876) 1 App Cas 120, HL; *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* (1979) 16 BLR 76, NZ CA.

6 *Neodox v Swinton and Pendlebury Borough Council* (1958) 5 BLR 34; *National Coal Board v William Neill & Son (St Helens) Ltd* [1985] QB 300, [1984] 1 All ER 555, 26 BLR 81.

7 Where a dwelling house is being constructed there is an implied warranty that the building will be fit for human habitation: see *Jennings v Tavenor* [1955] 2 All ER 769, [1955] 1 WLR 932. Under the Defective Premises Act 1972 there is a statutory duty to carry out work for or in connection with the provision of a dwelling so that as regards that work the dwelling will be fit for habitation when completed. See also paras 77-79 post. Where the contractor expressly undertakes to design and construct a building or other work to an outline specification provided by the employer, the contract is colloquially known as a 'package deal' contract: see para 8 ante. As to implied terms relating to suitability see also paras 77-79 post. See also *Co-operative Insurance Society Ltd v Henry Boot Scotland Ltd* [2002] EWHC 1270 (TCC), [2002] All ER (D) 8 (Jul), where it was held that when someone undertook on terms to complete a design commenced by someone else, that person agreed that the result, however much of the design work was done before the process of completion commenced, would have been prepared with reasonable skill and care.

8 *Farnsworth v Garrard* (1807) 1 Camp 38; *Denew v Daverell* (1813) 3 Camp 451; *Grounsell v Lamb* (1836) 1 M & W 352; *Hall v Burke* (1886) 3 TLR 165, CA. See also *Basten v Butter* (1806) 7 East 479; *Cousins v Paddon* (1835) 5 Tyr 535.

9 Cf *Ollivant v Bayley* (1843) 5 QB 288; *Chanter v Hopkins* (1838) 4 M & W 399. See also *Aldi Stores Ltd v Holmes Building plc* [2002] All ER (D) 453 (Mar). The contractor must however meet any with implied terms relating to workmanship and materials: see para 76 post.

10 *Thorn v London Corpn* (1876) 1 App Cas 120, HL; *Jackson v Eastbourne Local Board* (1886) 2 Hudson's BC (4th Edn) 81, HL.

11 *Bottoms v York Corpn* (1892) 2 Hudson's BC (4th Edn) 208, CA; *McDonald v Workington Corpn* (1893) 9 TLR 230, CA; *Jackson v Eastbourne Local Board* (1886) 2 Hudson's BC (4th Edn) 81, HL.

12 See para 74 post. This will not operate to extricate a contractor from a difficulty for which he is liable: see *Simplex Concrete Piles Ltd v St Pancras Borough Council* (1958) 14 BLR 80; distinguished in *Howard de Walden Estates Ltd v Costain Management Design Ltd* (1991) 55 BLR 124.

13 *Re Nuttall and Lynton and Barnstaple Rly Co's Arbitration* (1899) 2 Hudson's BC (4th Edn) 279, 82 LT 17, CA; *CJ Pearce & Co Ltd v Hereford Corpn* (1968) 66 LGR 647; and see para 74 et seq post.

UPDATE

63 Extent of the obligation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 5--See *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291, [2005] 1 WLR 2339.

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64. Effect of substantial completion.

Where a contract, which does not fall within the definition of a construction contract under the Housing Grants, Construction and Regeneration Act 1996¹ or which is for work of less than 45 days' duration², provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions³. In the absence of a very clear stipulation that entire completion is a condition precedent to the contractor's right to payment, the contractor can claim the contract price if he can show that he has substantially completed the contract⁴. In such a case, the contractor can recover the price subject to the deduction of the reasonable cost of completing the defective or unfinished work⁵. Whether or not the contractor has substantially completed the work is a question of fact in each case⁶.

¹ As to construction contracts generally see para 9 ante. For the meaning of 'construction contract' see para 9 ante.

² The Housing Grants, Construction and Regeneration Act 1996 provides for a statutory entitlement to payment by instalments, stage payments or other periodic payments in construction contracts where the duration of the work is to be more than 45 days: see s 109(1); and para 155 post. In default of agreement between the parties, the scheme for construction contracts will determine the amount of, and dates for, payment: see s 109(3); and para 155 post. As to payment provisions under the scheme for construction contracts see para 160 post.

³ *Hoening v Isaac* [1952] 2 All ER 176 at 182, CA, per Denning LJ.

⁴ *Hoening v Isaacs* [1952] 2 All ER 176, CA; *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, CA; cf *Appleby v Myers* (1867) LR 2 CP 651; *Sumpter v Hedges* [1898] 1 QB 673, CA; *Forman & Co Pty Ltd v The Liddesdale* [1900] AC 190, PC; *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254, DC; affd [1932] 1 KB 423, CA. As to entire contracts see para 8 ante.

⁵ *Broom v Davis* (1794) 7 East 480n; *Thornton v Place* (1832) 1 Mood & R 218; *Cutler v Close* (1832) 5 C & P 337; *H Dakin & Co Ltd v Lee* [1916] 1 KB 566, CA. For the applicability of these principles to the professional's right to payment of fees see *Hutchinson v Harris* (1978) 10 BLR 19, CA; *Turner Page Music Ltd v Torres Design Associates Ltd* (1997) CILL 1263, CA.

⁶ See the cases cited in notes 3-5 supra; and *Kiely & Sons Ltd v Medcraft* (1965) 109 Sol Jo 829, CA; *Ibmac Ltd v Marshall (Homes) Ltd* (1968) 208 Estates Gazette 851, CA; *Bolton v Mahadeva* [1972] 2 All ER 1322, [1972] 1 WLR 1009, CA; *Technistudy Ltd v Kelland* [1976] 1 WLR 1042 at 1045, CA, per Lord Denning MR.

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(ii) Time for Completion

65. When time is of the essence of the contract.

The expression 'time is of the essence' means that a breach of the condition as to time for performance will entitle the innocent party to treat the breach as a repudiation of the contract, without regard to the magnitude of the breach¹, and normally, to claim damages for loss of bargain². Exceptionally, however, the completion of the work by a specified date may be a condition precedent to the contractor's right to be paid³. Ordinarily time is not of the essence in building contracts. Time may be provided to be of the essence of the contract by the express agreement of the parties or by necessary implication⁴. Such an implication may be excluded by construction of other provisions of the contract: time is normally not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed for completion⁵, nor when the parties contemplate a postponement of completion⁶. Time cannot be of the essence if a date is not specified or capable of precise determination by the parties⁷.

1 See CONTRACT vol 9(1) (Reissue) para 928 et seq; and *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA.

2 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114 at 120, CA, per Salmon LJ; *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, HL.

3 *Maryon v Carter* (1830) 4 C & P 295; *Munro v Butt* (1858) 8 E & B 738. However, see now the Housing Grants, Construction and Regeneration Act 1996 which provides for a statutory entitlement to payment by instalments, stage payments or other periodic payments in construction contracts where the duration of the work is to be more than 45 days and where the contract is a 'construction contract' (see para 9 ante) within the meaning of that Act: see s 109(1); and para 155 post.

4 See CONTRACT vol 9(1) (Reissue) para 932.

5 *Lamprell v Billericay Union* (1849) 3 Exch 283 at 303 per Rolfe B; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA.

6 *Webb v Hughes* (1870) LR 10 Eq 281; *Hartley v Hymans* [1920] 3 KB 475; *Lock v Bell* [1931] 1 Ch 35. See also *Lowther v Heaver* (1889) 41 ChD 248 at 268, CA, per Lindley LJ; but cf *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1, (1970) 1 BLR 114, CA, per Salmon LJ.

7 *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842 at 857, [1989] 3 All ER 492 at 504, CA, per Sir Nicholas Browne-Wilkinson.

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66. When time is not of the essence.

Where time is not of the essence of the contract, but a time for completion is specified, the employer will be entitled to damages upon the contractor's default¹. Where there is no completion date specified, the contractor must complete the work within a reasonable time². In either of the above situations, or when time has ceased to be of the essence by waiver or agreement, then, a reasonable time for performance having elapsed, the employer can serve a notice requiring completion by a certain date and dismiss the contractor on a failure to complete by the fixed date³. If, by reason of the breach of contract or by reason of extra work ordered by him, the employer prevents the contractor from completing the work by the date fixed or materially abridges the period for execution of work, then unless the contract clearly provides to the contrary, the employer can only insist on completion within a reasonable time⁴. The onus of proof that delay has been caused by some act or default of the employer is on the contractor⁵. Some building contracts provide for determination in specific circumstances of delay.

1 *Lucas v Godwin* (1837) 3 Bing NC 737; cf *Tidey v Mollett* (1864) 16 CBNS 298. See generally DAMAGES.

2 *Startup v McDonald* (1843) 6 Man & G 593 at 611 per Rolfe B.

3 *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL. As to the giving of notice generally see *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA. The service of such a notice will not cancel a time breach already committed: *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL.

4 See note 3 supra; and *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA.

5 *Morts Dock and Engineering Co Ltd v Wadey* (1905) 22 TLR 61, PC.

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67. Degree of completion necessary.

Modern standard forms of contract¹ for works of construction require the architect or engineer to certify that the works have been practically or substantially completed, and the contractor's obligation to complete the works by a specified date is in such cases usually discharged if the works are practically completed by the contract date². If, owing to latent defects, substantial remedial work is necessary after the contractor has left the site, the contract is nevertheless completed at the date the contractor left the site³.

1 As to standard forms of contract see para 2 ante.

2 As to the degree of completion otherwise see para 8 text and notes 1-7 ante; and the cases cited in note 3 infra.

3 See *Westminster City Council v Jarvis & Sons Ltd* [1970] 1 All ER 943 at 949, [1970] 1 WLR 637 at 647, HL, per Viscount Dilhorne; and see *HW Nevill (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78 at 87 per Judge Newey QC; *Emson Eastern Ltd v EME Developments Ltd* (1991) 55 BLR 114, (1991) 26 ConLR 57.

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68. Time at large.

Time is said to be 'at large'¹ in situations such as the following²: (1) where a building contractor is prevented from completing by the time specified in the contract by an act of the employer or an act for which the employer is responsible under the contract (such as a breach of contract or ordering additional or varied work³); (2) where a building contract contains provisions enabling the time for completion to be extended and thus to preserve the right to damages for failure to complete on time⁴, notwithstanding the occurrence of an act of prevention, and either: (a) the act of prevention which occurs is not one which enables time to be extended; or (b) the machinery for extending time has not been operated properly (or cannot be saved by, for example, the operation of an arbitration clause) or cannot be operated at all because the architect or engineer has not been appointed or re-appointed to determine the amount of the extension of time⁵.

In situations such as these the contractor's obligation to complete by the contract date or within the contract period (or extended date or period) is discharged but nevertheless an obligation to complete within a reasonable time or within a reasonable period remains. In cases where the contract contains a power to extend time there is likely to be no practical difference in the result as the expiration of a reasonable time or period will be equivalent to the time or period that would have been granted by extension (unless events also occur which would not have entitled the contractor to an extension of time but are to be taken into account in determining a reasonable time or period for completion⁶). Where, however, the right to recover liquidated damages is dependent upon a failure to complete by the contract completion date or extended date that right will fall with the discharge of the contractor's obligation so to do⁷. However, the contractor will be liable to pay unliquidated damages for failure to complete within the reasonable time or period⁸.

1 *Holme v Guppy* (1838) 3 M & W 387 at 389-390 per Parke B.

2 The situations described are those which commonly arise. For cases on the subject see *Roberts v Bury Comrs* (1870) LR 5 CP 310; *Dodd v Churton* [1897] 1 QB 562, CA; *Wells v Army and Navy Co-operative Society* (1902) 86 LT 764; *Amalgamated Building Constructions Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452, 50 LGR 667, CA; *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1, (1970) 1 BLR 114, CA; *Astilleros Canarios SA v Cape Hatteras Shipping Co Inc, The Cape Hatteras* [1982] 1 Lloyd's Rep 518; *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 29 BLR 5, CA; *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391; *McAlpine Humberoak Ltd v McDermott International Inc* (1992) 58 BLR 1, CA; and *Perini Pacific v Greater Vancouver Sewerage and Drainage District* (1966) 57 DLR (2d) 307, BC CA.

3 It is a question of construction, however, whether the contractor may still be obliged to complete the additional varied work within the time specified.

4 See eg *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1 at 11, (1970) 1 BLR 114 at 121, CA, per Salmon LJ.

5 The principles stated will most likely still apply even if the contractor has been guilty of delays of his own such that the due date for completion cannot be met: see *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, Vic SC; cf *Astilleros Canarios SA v Cape Hatteras Shipping Co Inc, The Cape Hatteras* [1982] 1 Lloyd's Rep 518.

6 Cf eg *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 at 511 per Robert Goff J.

7 See *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1 at 11, (1970) 1 BLR 114 at 121, CA, per Salmon LJ.

8 See *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1 at 11, (1970) 1 BLR 114 at 121, CA, per Salmon LJ; *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 29 BLR 5 at 16, CA, per Stephenson LJ, and at 19 per Lloyd LJ; *McAlpine Humberoak Ltd v McDermott International Inc* (1992) 58 BLR 1, CA. See also *Elsley v Collins (JG) Insurance Agencies Ltd* (1978) 83 DLR (3d) 1, Can SC. See further para 73 post.

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(iii) Extension of Time and Liquidated Damages for Delay

69. Extension of time and liquidated damages.

Generally, contracts for construction works provide that in the event of the contractor's failure to complete by the date specified for completion the contractor is to pay a specified sum or that the employer may deduct a specified sum from money due to the contractor¹. There must be a definite date from which liquidated damages are to run; if there is no specified date or if the date for completion is invalidated by an instruction to the contractor to carry out additional work² or by some other fault of the employer the employer's right to claim or deduct liquidated damages will be lost³. The parties therefore frequently give to the architect or engineer power to grant the contractor an extension of time for the completion of the works, and thus a new completion date is substituted and the right to liquidated damages remains alive⁴.

Liquidated damages and extension of time clauses are construed against the party wishing to enforce them and will not embrace delays caused by a breach of contract by the employer or acts of the architect unless clear words are used⁵. If, however, the contractor has undertaken to complete the work and any additional work which may be ordered within the specified time, he is bound to do so and the existence of an extension of time clause in the contract is immaterial⁶. A contractual provision for extension of time for delay due to the employer's breach of contract or by ordering extra work will not exclude the contractor's rights to damages or additional payment⁷.

1 Such provision will be unenforceable as a penalty if it stands against the principle mentioned in para 72 post. In particular such clauses are found in the standard forms of building contracts. As to standard forms of contract see para 2 ante.

2 As to variations and extras see para 74 post.

3 *Legge v Harlock* (1848) 12 QB 1015; *Dodd v Churton* [1897] 1 QB 562, CA.

4 *Trollope & Colls Ltd v North West Metropolitan Regional Health Board* [1973] 2 All ER 260, [1973] 1 WLR 601, HL; *Percy Bilton Ltd v GLC* [1982] 2 All ER 623, [1982] 1 WLR 794, 20 BLR 1, HL. When an agreement for the acceleration of work has been made, the dates in the provisions of an existing sectional completion agreement can be replaced with dates corresponding to the acceleration agreement and the extension of time and liquidated damages provisions are capable of continuing to have force by reference to the new dates for completion of each section: *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31.

5 *Wells v Army and Navy Co-operative Society Ltd* (1902) 86 LT 764; *Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District* (1966) 57 DLR (2d) 307, BC CA; *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1, (1970) 1 BLR 114, CA.

6 *Jones v St John's College, Oxford* (1870) LR 6 QB 115; *Tew v Newbold-on-Avon United District School Board* (1884) Cab & El 260.

7 *Roberts v Bury Improvement Comrs* (1870) LR 5 CP 310 at 327 per Kelly CB; *Miller v LCC* (1934) 151 LT 425.

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70. Exercise of a power to extend time.

The time when and the conditions under which the architect or engineer should exercise his jurisdiction to extend the date for completion will depend upon the terms of the contract. Standard forms of contract¹ require the contractor to make a written application for the grant of an extension of time². Occasionally a contract may still provide that an extension of time must be granted before completion so that a later exercise of the power is invalid and liquidated damages are irrecoverable³. Where an extension is for the contractor's benefit it seems that the power can be exercised retrospectively⁴. If, however, the wording of the extension of time provision is sufficiently clear a retrospective extension can also be granted in respect of delays caused by the employer⁵. An extension of time may be conditional on a proper application therefor but the architect would still be expected to be aware of the reason for a delay⁶. If the contractor applies for and obtains an extension of time from the architect, he may be deemed to have waived any objection to the architect's jurisdiction⁷. The proper discharge of an architect's function in determining a fair and reasonable extension of time requires a logical and methodical analysis of the impact that the relevant matters had on the contractor's programme⁸.

1 As to standard forms of contract see para 2 ante.

2 *Miller v LCC* (1934) 151 LT 425.

3 *Miller v LCC* (1934) 151 LT 425; *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452, CA.

4 *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452, CA.

5 *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1 (construing the extension of time clause in the JCT standard form of contract). As to JCT standard forms of contract see para 2 ante.

6 *Merton London Borough Council v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 89-94 per Vinelott J. If such a provision is construed as a condition precedent it seems doubtful, if the delay has been caused by the employer's default, that although the contractor may be deprived of an extension of time, the employer could maintain a claim for liquidated damages since to do so would be to condone his own breach of contract.

7 *Sattin v Poole* (1901) 2 Hudson's BC (4th Edn) 306.

8 *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31.

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71. Exercise of power to deduct liquidated damages.

The terms of the contract may provide for notice of intention to deduct liquidated damages to be given by the employer to the contractor as a condition precedent to such deduction, and the issue of a certificate of failure to complete may also be such a condition precedent¹. If the architect fails pursuant to any terms of the contract to give a proper extension of time, the deduction of liquidated damages may be disallowed². Liquidated damages clauses may provide the sole remedy for delay so that unliquidated damages cannot be claimed instead³. If a liquidated damages clause is void for uncertainty, unliquidated damages may still be claimed⁴.

1 See *A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association* (1989) 46 BLR 102; *JF Finnegan Ltd v Community Housing Association Ltd* (1993) 65 BLR 103, (1993) 34 ConLR 104; affd on this point (1995) 77 BLR 22, CA. See also *Skanska Construction UK Ltd (formerly Kvaerner Construction Ltd) v Egger (Barony) Ltd (No 2)* [2002] All ER (D) 15 (Jun), where delay in considering applications for extensions of time did not render a notice of deduction of liquidated and ascertained damages invalid.

2 *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452, CA.

3 *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20, HL. If parties to a contract enter 'Énil' for liquidated damages, then there is no remedy in damages at all for delay: *Temloc Ltd v Erroll Properties Ltd* (1987) 39 BLR 30, CA; cf *Baese Pty Ltd v RA Bracken Building Pty Ltd* (1989) 52 BLR 130.

4 *Arnhold v A-G of Hong Kong* (1989) 47 BLR 129, HK HC; *Philips Hong Kong Ltd v A-G of Hong Kong* (1990) 50 BLR 122, HK HC; revsd on other grounds (1991) 58 BLR 112, HK CA; affd (1993) 61 BLR 41, PC. The latter case was primarily concerned with whether the relevant clause was a penalty (see para 72 post). The proposition was not contradicted but the Privy Council determined that the liquidated damages provisions under consideration were not uncertain so as to be unenforceable. See also para 68 ante.

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72. Penalty or liquidated damages.

Although expressed in the contract to be a liquidated damages clause, in law such a clause may amount to a penalty¹. The question whether such provision is in the nature of liquidated damages or is unenforceable as a penalty is a question of the construction of the terms and the inherent circumstances of each contract judged at the time the contract was made². The fact that it would be difficult to ascertain the loss caused to the employer by delaying completion indicates that the provision is in the nature of liquidated damages³. When a sum specified as payable is extravagant or totally out of proportion to the range of possible losses which might be incurred, the provision will be a penalty and unenforceable to any extent greater than the party's actual loss⁴. Liquidated damages clauses will not be easily set aside as unenforceable since what the parties have agreed should normally be upheld⁵. A forfeiture clause may also be a penalty clause. For example, a provision, that on failure to complete on time, the contractor will forfeit the retention money is a penalty because the amount of retention money held will vary according to the amount of work done and it cannot therefore be a genuine pre-estimate of the loss likely to be caused to the employer in the event of delay⁶. If the contract provides for a variable rate but with a minimum amount, liquidated damages may not be recoverable⁷.

1 The label used by the parties is not conclusive: see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86, HL, per Lord Dunedin. See also DAMAGES vol 12(1) (Reissue) para 1065 et seq; and as to the equitable doctrine of relief against penalties see EQUITY vol 16(2) (Reissue) para 452 et seq.

2 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Public Works Comr v Hills* [1906] AC 368, PC; *Webster v Bosanquet* [1912] AC 394, PC; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20, HL; *Philips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, PC.

3 *Fletcher v Dyche* (1787) 2 Term Rep 32.

4 *Kemble v Farren* (1829) 6 Bing 141; *Re Newman, ex p Capper* (1876) 4 ChD 724, CA; cf *Cameron-Head v Cameron* 1919 SC 627; *Watts v Mitsui* [1917] AC 227, HL.

5 *Philips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, PC (it will normally be insufficient to establish that a provision is objectionably penal by simply identifying situations when the application of the provision could result in a larger sum being recovered than the actual loss suffered). See also *JF Finnegan Ltd v Community Housing Association Ltd* (1993) 65 BLR 103, (1993) 34 ConLR 104; revsd on another point (1995) 77 BLR 22, CA.

6 *Public Works Comr v Hills* [1906] AC 368, PC; *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

7 In *Philips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, the Privy Council held that there could conceivably be circumstances where it was so obvious, before completion of the works as a whole, that the actual loss to be sustained would be less than a specified minimum figure that to include that minimum figure in a provision for the payment of liquidated damages on a reduced sliding scale would have the effect of transforming an otherwise perfectly proper liquidated damages provision into a penalty, in so far as it prevents the liquidated damages from being reduced below that figure. On the facts it was held that neither the case under consideration, nor the facts of *Arnhold & Co Ltd v A-G of Hong Kong* (1987) 47 BLR 129, HK HC, justified such a finding.

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73. Recovery of unliquidated damages.

Where the time fixed for completion in the contract has ceased to be applicable in consequence of some fault of the employer, and consequently his right to liquidated damages has gone, he can have no claim for unliquidated damages unless the builder fails to complete within a reasonable time¹.

Where a right to liquidated damages is lost, unliquidated damages may still be recoverable².

¹ See para 68 ante; and *Ford v Cotesworth* (1870) LR 5 QB 544; *Tyers v Rosedale and Ferryhill Iron Co* (1875) LR 10 Exch 195; *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1985) 29 BLR 5 at 16, CA, per Stephenson LJ, and at 19 per Lloyd LJ. It is undecided whether time is at large in this situation: see *Dodd v Churton* [1897] 1 QB 562, CA; *Trollope & Colls Ltd v North West Metropolitan Regional Health Board* [1973] 2 All ER 260, [1973] 1 WLR 601, HL; *Percy Bilton Ltd v GLC* [1982] 2 All ER 623, [1982] 1 WLR 794, 20 BLR 1, HL.

² See the cases cited in para 68 note 8 ante. The right to liquidated damages may be lost because the relevant provision is a penalty, by reason of some fault of the employer or in consequence of a drafting error in the contract. It is an open question whether in any of these circumstances the employer can recover as unliquidated damages a sum greater than the agreed liquidated amount. The answer may not be the same in each circumstance. As to the distinction between a penalty and liquidated damages see para 72 ante.

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(2) EXTRA WORK AND VARIATIONS

74. Extra work and variations.

Unless the building contract expressly provides that the contractor is obliged to comply with the requirements of the employer to change the works contracted for (whether by way of addition, alteration or omission) the contractor is not obliged to do so. They must form the subject of a new contract or be a variation of the original contract¹. If a contractor carries out unauthorised work he is not entitled to be paid in the absence of special circumstances². Even where the contract does contain express provisions for the contractor to make changes, it is a matter of interpretation whether the changes fall within the power³. If the work falls outside the scope of the contract the employer may be liable to pay if a promise to pay can be found⁴.

1 See *Holland Hannen and Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80; *Blue Circle Industries plc v Holland Dredging Co (UK) Ltd* (1987) 37 BLR 40, CA.

2 Such as conduct tantamount to fraud: *Hill v South Staffordshire Rly* (1865) 12 LT 63; *Molloy v Liebe* (1910) 102 LT 616, PC; *Brodie v Cardiff Corpn* [1919] AC 337, HL.

3 See eg *Blue Circle Industries plc v Holland Dredging Co (UK) Ltd* (1987) 37 BLR 40, CA.

4 *Russell v Viscount Sa da Bandeira* (1862) 13 CBNS 149; cf *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA; *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248, CA.

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(3) OBLIGATIONS AS TO DESIGN, WORKMANSHIP AND MATERIALS

(i) In general

75. Obligations as to design.

The building contract may provide for the allocation of responsibility for the design of the works, which commonly means the determination of what is necessary to meet the requirements of the building owner or the person for whom the building is intended to be occupied (for example, the house owner). An obligation as to design is frequently no more than the obligation to complete so that the works are fit for their purpose¹. This may entail not only preparing the proposed design of the works but also making changes to it as may be necessary if the works proceed or after completion so that the works are fit for their purpose². Where the contract is silent, design obligations are a matter of implication although, unless a contrary intention appears, the person responsible for building works will be treated as the designer since reliance will have been placed upon that person³.

The contractor may be liable to the employer for a defective design produced by a third party⁴.

1 See paras 3 ante, 241 post.

2 As to variations and extras see paras 74 ante, 248 et seq post.

3 See para 76 post.

4 See *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1, HL; *Lindenberg v Canning* (1992) 62 BLR 147, (1992) 29 ConLR 71.

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76. Obligations as to workmanship and materials.

The drawings and the specification or bill of quantities will normally specify the quality and type of materials to be used, the workmanship to be employed and sometimes also the method of work to be adopted. They may also specify the purpose or purposes for which the completed works are to be fit. The contractor may thereby come under an express obligation to furnish or be responsible for the design of the works. Such a specification is sometimes called a 'performance specification', particularly for mechanical, electrical or other engineering works or services but also for building works generally.

Building contracts made after 4 July 1983 are subject to the Supply of Goods and Services Act 1982¹, which regulates obligations as to the quality and fitness of building work and services. Building contracts may similarly be subject to the provisions of the Consumer Protection Act 1987². In respect of the fitness and quality of materials, the terms which at common law will be implied in a building contract³, that is a contract for work and materials, correspond to the terms implied in the case of a sale of goods⁴. Three warranties will be implied: (1) that the materials used in the works and the completed works themselves will be reasonably fit for the purpose for which they are required⁵; (2) that the materials used will be of good quality⁶; and (3) that the work will be carried out in a good and workmanlike manner⁷.

Where a contractor undertakes to erect and sell a dwelling or to complete and sell a dwelling in the course of erection, it is an implied term that the dwelling will be fit for its purpose, that is for human habitation⁸. Where the contract is for the completion of a dwelling, the implied term may embrace defects existing at the date of the contract⁹. The implication of a warranty of fitness may be excluded where the employer has ordered particular materials under a trade name¹⁰, and will be excluded where the express terms of the contract are inconsistent with such an implication¹¹, or where the circumstances are such that the employer has not relied on the skill and judgment of the contractor¹². The partial reliance on the skill of the contractor may be sufficient for the implication of a warranty of fitness¹³.

At common law the contractor's obligations in respect of fitness, quality and workmanship will not generally merge in a subsequent conveyance of the dwelling¹⁴ and a claim for breach of such implied terms can therefore be maintained after conveyance.

A warranty of fitness is implied in every contract unless it is displaced by the express terms or other relevant circumstances¹⁵. The reason for this presumption is the practical convenience of having a chain of contractual liability from the employer to the main contractor and from the main contractor to the sub-contractor¹⁶, but it may be displaced by the selection of materials obtainable only from a particular source under a contract by which the contractor is not entitled to an indemnity¹⁷ or where the work or materials are to be provided by a sub-contractor or supplier nominated by the employer¹⁸ or where there is no reliance¹⁹.

1 For a full account of the Supply of Goods and Services Act 1982 see SALE OF GOODS AND SUPPLY OF SERVICES. See in particular ss 13, 14, 16; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 97 et seq.

2 See para 96 post; and SALE OF GOODS AND SUPPLY OF SERVICES.

3 Also in a licence: see *Wettern Electric Ltd v Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629.

4 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL; *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1, HL. See generally SALE OF GOODS AND SUPPLY OF SERVICES.

5 *Test Valley Borough Council v GLC* (1979) 13 BLR 63, CA; *Viking Grain Storage Ltd v TH White Installations Ltd* (1985) 33 BLR 103. See also *Francis v Cockrell* (1870) LR 5 QB 501. See also *Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd* (1996) 78 BLR 1, (1996) 12 Const LJ 333, CA.

6 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL. If the materials are merchantable in the sense that they are sellable and capable of being used for one or more purposes, even though unsuitable for the precise application contemplated by the contractor, there will be no breach of the implied warranty of quality: see *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd; Holland Colombo Trading Society Ltd v Grimsdale & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444, HL; *BS Brown & Son Ltd v Craiks Ltd* [1970] 1 All ER 823, [1970] 1 WLR 725, HL; *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 All ER 135, [1987] 1 WLR 1, CA; *Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd* (1996) 78 BLR 1, (1996) 12 Const LJ 333, CA.

7 *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901 at 903, [1966] 1 WLR 1317 at 1332, CA, per Lord Denning MR. As to workmanship see *Duncan v Blundell* (1820) 3 Stark 6; *Pearce v Tucker* (1862) 3 F & F 136; *Billyack v Leyland Construction Co Ltd* [1968] 1 All ER 783, [1968] 1 WLR 471.

8 *Lawrence v Cassel* [1930] 2 KB 83, CA; *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113; *Jennings v Tavener* [1955] 2 All ER 769, [1955] 1 WLR 932; and see *Test Valley Borough Council v GLC* (1979) 13 BLR 63, CA.

9 *Perry v Sharon Development Co Ltd* [1937] 4 All ER 390 at 395, CA, per Romer LJ; *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 1 at 7, [1966] 1 WLR 1317 at 1325 per Diplock LJ; affd [1966] 2 All ER 901, [1966] 1 WLR 1317, CA.

10 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454 at 469, [1968] 2 All ER 1169 at 1174, HL, per Lord Pearce; cf, however, Lord Upjohn at 474, 1177.

11 *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA. See also *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901 at 904, [1966] 1 WLR 1317 at 1333, CA, per Lord Denning MR; and see *King v Victor Parsons & Co* [1972] 2 All ER 625, [1972] 1 WLR 801; affd [1973] 1 All ER 206, [1973] 1 WLR 29, CA.

12 *Duncan v Blundell* (1820) 3 Stark 6 at 7 per Bayley J; *Bower v Chapel-en-le-Frith RDC* (1910) 75 JP 122; *Myers v Brent Cross Service Co* [1934] 1 KB 46 at 55 per du Parcq J; *Stewart v Reavell's Garage* [1952] 2 QB 545 at 550, [1952] 1 All ER 1191 at 1193 per Sellers J. The illustration given by du Parcq J in *Myers v Brent Cross Service Co* supra at 55 was disapproved in *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL, but the statement of principle was approved. In *Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd* (1996) 78 BLR 1, (1996) 12 Const LJ 333, CA, whether the employer had relied upon the skill and judgment of the contractor was regarded as the critical question.

13 *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] AC 402, HL. See further the Sale of Goods Act 1979 s 14(3) (as amended); the Supply of Goods and Services Act 1982 s 4 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 78 et seq, 84 et seq.

14 *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901 at 904, [1966] 1 WLR 1317 at 1333, CA, per Lord Denning MR; affg [1966] 2 All ER 1 at 5-6, [1966] 1 WLR 1317 at 1324 per Diplock LJ. For the statutory provisions see paras 77-79 post.

15 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL. For the circumstances to be taken into account see *Rotherham Metropolitan Borough Council v Frank Haslam Milan & Co Ltd* (1996) 78 BLR 1, (1996) 12 Const LJ 333, CA.

16 *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1 at 44, HL, per Lord Fraser of Tullybelton, citing *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL.

17 *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181, HL.

18 See para 40 et seq ante.

19 *University of Warwick v Sir Robert McAlpine* (1988) 42 BLR 1; sed quaere whether on the facts there was not such reliance.

UPDATE

76 Obligations as to workmanship and materials

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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77. Duty to build dwellings fit for habitation.

Under the Defective Premises Act 1972¹, a person who takes on work for or in connection with the provision of a dwelling, whether the dwelling is provided by the erection or by the conversion or enlargement of a building², owes a duty to ensure that the work he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling, when completed, will be fit for human habitation³. The duty includes both misfeasance and non-feasance⁴, and is owed by all persons taking on such work, including the building owner himself⁵ and those who carry out the work voluntarily⁶, and by any person who in the course of a business which includes the provision of or arranging for the provision of dwellings or installations in dwellings arranges for such work to be carried out⁷. The duty is owed to the first owner of the dwelling and to any person who subsequently acquires a legal or equitable interest in it⁸. Any cause of action in respect of a breach of that duty is deemed for the purposes of the provisions relating to the limitation of actions⁹ to have accrued at the time when the dwelling was completed unless any further work is done by the same person to rectify his earlier work, when the cause of action in respect of that further work is deemed to have accrued on its completion¹⁰.

Where a person takes on any such work for another on terms that he is to do it in accordance with the instructions given by or on behalf of that other¹¹, then provided that he has done the work properly and in accordance with those instructions he will be treated as having discharged his duty under the Act, unless he owes a duty to warn of any defects in the instructions and has failed to discharge that duty¹².

This duty is additional to any duty otherwise owed¹³ and cannot be excluded or restricted¹⁴.

1 See NEGLIGENCE vol 78 (2010) PARA 41 et seq. As to the effect of the Defective Premises Act 1972 on the existing law see *D & F Estates v Church Comrs for England* [1989] AC 177 at 193 et seq, [1988] 2 All ER 992 at 996 et seq, HL, per Lord Bridge of Harwich; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL. It does not cover work taken on before 1 January 1974: see the Defective Premises Act 1972 s 7(2); *Alexander v Mercouris* [1979] 3 All ER 305, [1975] 1 WLR 1270, CA; *Rimmer v Liverpool City Council* [1985] QB 1 at 7, [1984] 1 All ER 930 at 933, CA, per Stephenson LJ.

2 The Defective Premises Act 1972 does not include repair works to an existing dwelling: *Jacobs v Morton and Partners* (1994) 72 BLR 92.

3 See the Defective Premises Act 1972 s 1(1). A claimant must prove that the defect alleged makes the dwelling unfit for habitation: *Thompson v Clive Alexander & Partners (a firm)* (1992) 59 BLR 81.

4 *Andrews v Schooling* [1991] 3 All ER 723, [1991] 1 WLR 783, 53 BLR 68, CA.

5 The owner of a dwelling does not 'take on work' merely by giving instructions to others for work to be done: *Mirza v Bhandal* (27 April 1999) Lexis, Enggen Library, Cases File, QBD.

6 *Alexander v Mercouris* [1979] 3 All ER 305, [1975] 1 WLR 1270, CA.

7 Defective Premises Act 1972 s 1(4). The use of the word 'dwellings' in the plural in s 1(4) does not exclude a one-off activity for the business in question, ie it is not necessary for the business to provide more than one dwelling. Section 1(4) will also apply to each member of a partnership when the definition is satisfied as regards the partnership itself: *Mirza v Bhandal* (27 April 1999) Lexis, Enggen Library, Cases File, QBD.

8 See the Defective Premises Act 1972 s 1(1). As to cases excluded from these provisions see para 78 post.

9 le the Limitation Act 1980: see LIMITATION PERIODS.

10 See the Defective Premises Act 1972 s 1(5); Interpretation Act 1978 s 17(2)(a).

11 A person is not to be treated as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design: Defective Premises Act 1972 s 1(3).

12 See *ibid* s 1(2).

13 See *ibid* s 6(2).

14 See *ibid* s 6(3).

UPDATE

77-79 Duty to build dwellings fit for habitation ... Continuing duty of care on disposal of premises

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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78. Excluded cases.

No claim for a breach of the duty to provide dwellings fit for human habitation¹ may be brought by any person who has or who acquires an interest in a dwelling provided or sold or let for habitation under an approved scheme², provided that it is stated in a document of an approved type³ that the requirements as to design or construction imposed by or under the scheme have been, or appear to have been, substantially complied with⁴.

Where an interest in a dwelling is compulsorily acquired⁵ no claim may be brought by the acquiring authority for breach of the duty and if any work for or in connection with the provision of the dwelling was done, otherwise than in the course of business, by the person in occupation of the dwelling at the time of the compulsory acquisition, the acquiring authority and not that person is to be treated as the person who took on the work and accordingly as owing that duty⁶.

¹ See para 77 ante.

² An approved scheme must be approved by the Secretary of State (see the Defective Premises Act 1972 s 2(3)), and it must confer, by virtue of agreements entered into with persons having or acquiring an interest in the dwellings to which the scheme applies, rights on such persons in respect of defects in the state of the dwellings (s 2(2)(b)). The power of the Secretary of State to approve a scheme or document is exercisable by order, but approval of requirements as to construction or design imposed under the scheme does not have to be by order (see s 2(3)). The Secretary of State may approve a document or scheme with or without limiting the duration of his approval and he may by order revoke or vary a previous order or, if an approval has been given otherwise than by order, he may revoke or vary it without making an order: see s 2(4). The power to make an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution by either House of Parliament: s 2(6). At the date at which this volume states the law no order had been in force since 31 March 1979 as the House Building Standards (Approved Scheme etc) Order 1973, SI 1973/1843; the House Building Standards (Approved Scheme etc) Order 1975, SI 1975/1402; and the House Building Standards (Approved Scheme etc) Order 1977, SI 1977/642, were then superseded by the House Building Standards (Approved Scheme etc) Order 1979, SI 1979/381, which did not take effect. As to the Secretary of State see para 9 note 4 ante. As to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the National Assembly for Wales see para 9 note 4 ante.

³ A scheme may consist of any number of documents and any number of agreements or other transactions between any number of persons: Defective Premises Act 1972 s 2(2)(a). The production of a document purporting to be a copy of an approval given by the Secretary of State otherwise than by order (see note 2 supra) and certified by an officer of the Secretary of State to be a true copy of the approval is conclusive evidence of that approval without proof of the handwriting or official position of the person purporting to sign the certificate: s 2(5).

⁴ See *ibid* s 2(1).

⁵ See generally COMPULSORY ACQUISITION OF LAND.

⁶ Defective Premises Act 1972 s 2(7).

UPDATE

77-79 Duty to build dwellings fit for habitation ... Continuing duty of care on disposal of premises

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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79. Continuing duty of care on disposal of premises.

Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises¹, the duty of care owed, because of the doing of that work, to persons who might reasonably be expected to be affected by defects in the premises created by the doing of the work is not abated by the subsequent disposal² of the premises by the person who owed the duty³.

This does not apply to certain transactions⁴ occurring before 1 January 1974⁵.

1 The term 'premises' is not defined in the Defective Premises Act 1972; but see para 36 ante.

2 'Disposal', in relation to premises, includes a letting, and an assignment or surrender of a tenancy, of the premises and the creation by contract of any other right to occupy the premises, and 'dispose' is to be construed accordingly: *ibid* s 6(1). 'Tenancy' means: (1) a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but not including a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee; or (2) a tenancy at will or on sufferance; or (3) a tenancy, whether or not constituting a tenancy at common law, created by or in pursuance of any enactment, and cognate expressions must be construed accordingly: s 6(1).

3 *Ibid* s 3(1). Contracting out of this provision is prohibited: s 6(3).

4 *Ibid* s 3(2). The transactions concerned are: (1) where the premises are let and the relevant tenancy of the premises commenced, or the relevant tenancy agreement was entered into, before 1 January 1974 (s 3(2)(a)); (2) where the premises are otherwise disposed of, when the disposal of the premises was completed, or a contract for their disposal was entered into, before that date (s 3(2)(b)); or (3) in either case, where the relevant transaction disposing of the premises is entered into in pursuance of an enforceable option by which the consideration for the disposal was fixed before that date (s 3(2)(c)).

5 The date on which the Defective Premises Act 1972 came into force: s 7(2). See *Alexander v Mercouris* [1979] 3 All ER 305, [1975] 1 WLR 1270, CA.

UPDATE

77-79 Duty to build dwellings fit for habitation ... Continuing duty of care on disposal of premises

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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80. Building regulation.

Unless the contract¹ expressly provides to the contrary the contractor will, as part of the obligation to complete the works, be obliged to complete them so they meet the requirements of the provisions relating to building regulation².

1 As to the creation and nature of building contracts see para 1 et seq ante. As to contractual terms generally see CONTRACT vol 9(1) (Reissue) paras 767-835.

2 As to building regulation see BUILDING.

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(ii) Materials and Nominations

81. Nominated and designated suppliers.

Employers often wish to ensure that goods used in the works are supplied by a particular supplier. They may do so by way of a formal nomination of a supplier by a mechanism prescribed in the main contract, or they may simply specify the name of a supplier in the Contract Bills. Nomination under a standard form¹ may have the result that the contractor's obligation in relation to items supplied by the nominated supplier is limited and may be confined to taking steps required by the contract to secure timely performance by the supplier. He may be under no obligation to obtain the goods from an alternative source if the supplier should wholly fail, unless and until the employer nominates another supplier². The specification of suppliers may not affect the main contractor's primary liability to supply the goods specified, although it may affect warranties in respect of the goods³.

1 As to standard forms of contract see para 2 ante.

2 *North West Metropolitan Regional Hospital Board v TA Bickerton & Sons Ltd* [1970] 1 All ER 1039, [1970] 1 WLR 607, HL; *Fairclough Building Ltd v Rhuddlan Borough Council* (1985) 30 BLR 26, CA.

3 *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181, HL. See paras 82-83 post. Where the contract provides for a particular supplier or any other approved supplier, the contractor must obtain the agreement of the employer before substituting an alternative supplier: *Leedsford Ltd v Bradford City Council* (1956) 24 BLR 45, CA.

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82. Warranties of fitness.

Where the employer instructs the contractor to obtain specified materials from a particular manufacturer or supplier, whether by formal nomination or by simple designation, the employer may not rely on the skill and judgment of the contractor in selecting such materials. Accordingly the implied term of the main contract as to suitability may not extend to materials supplied by a nominated supplier¹. Where such materials are defective only by reason of being unfit for their purpose, and where the employer did not seek and rely on the main contractor's skill and judgment in respect of them, the employer will generally have no remedy in the absence of an express warranty given to him by the supplier². In some cases, the supplier may be liable to the employer on a collateral contract³. There are forms of warranty for use in conjunction with standard form building contracts⁴.

¹ *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454 at 468, [1968] 2 All ER 1169 at 1173, HL, per Lord Reid, at 475, 1178 per Lord Upjohn, and at 479, 1180 per Lord Wilberforce; *Rotherham Metropolitan Borough Council v Frank Haslam Milan* (1996) 78 BLR 1, (1996) 12 Const LJ 333, CA. See further the Sale of Goods Act 1979 s 14(3) (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 79, 467.

² *Comyn Ching & Co (London) Ltd v Oriental Tube Co Ltd* (1981) 17 BLR 47 at 81, CA, per Robert Goff LJ. See *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1, HL; and *University of Warwick v Sir Robert McAlpine* (1988) 42 BLR 1.

³ *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854, [1951] 2 All ER 471; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 QB 170, [1964] 1 All ER 41; cf *British Steel plc v Celtic Process Control Ltd* (1991) 63 BLR 119; *George Fischer Holding Ltd v Multi Design Consultants Ltd* (1998) 61 ConLR 85.

⁴ For an illustration see *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, 41 BLR 43, CA. As to standard forms of contract see para 2 ante.

UPDATE

82-83 Warranties of fitness, Warranties of quality

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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83. Warranties of quality.

Generally the implied term of the main contract that the materials used should be of good quality will apply where materials are supplied by a nominated supplier. Where the contract provides that the contractor may reasonably object to the nomination of a sub-contractor but gives no similar right in respect of the nomination of suppliers, the implied warranty of quality may be excluded from the main contract in respect of materials supplied by a nominated supplier¹. Where the nominated supplier contracts on terms which limit his liability for defects of quality, the implied warranty of quality may to a like extent be excluded from the main contract².

1 *Gloucestershire County Council v Richardson* [1969] 1 AC 480 at 496, [1968] 2 All ER 1181 at 1185, HL, per Lord Pearce, at 503, 1190 per Lord Upjohn, at 507, 1192 per Lord Wilberforce; cf per Lord Pearson at 511, 1195.

2 *Gloucestershire County Council v Richardson* [1969] 1 AC 480 at 496, [1968] 2 All ER 1181 at 1186, HL, per Lord Pearce, at 503, 1190 per Lord Upjohn, at 507, 1192 per Lord Wilberforce; cf per Lord Pearson at 511, 1195. As to the exclusion of implied terms and conditions see the Sale of Goods Act 1979 s 55(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 100. For breach of the implied warranty of quality see *Rotherham Metropolitan Borough Council v Frank Haslam Milan* (1996) 78 BLR 1, (1996) 12 Const LJ 333, CA; and para 76 ante.

UPDATE

82-83 Warranties of fitness, Warranties of quality

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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84. Vesting of materials: fixed materials in the absence of an express term.

Once materials are fixed as part of the permanent works, the maxim *quicquid plantatur solo, solo cedit* applies and the property in fixed materials passes to the owner of the land¹. A contractor has no lien on fixed materials and can only sue the employer for sums due under the contract². A contractor has no right to materials which although once fixed are subsequently severed³.

Once materials are so fixed that their separate identity has been subsumed into that of the new product, then no separate title to them remains⁴.

1 Whatever is fixed to the soil belongs to the soil: *Elwes v Maw* (1802) 3 East 38; *Appleby v Myers* (1867) LR 2 CP 651. This doctrine applies equally to goods subject to retention of title clauses: see *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA. A contractor may, however, remove and substitute fixed materials without leave for the purpose of carrying out remedial work: see *Appleby v Myers* supra at 659 per Blackburn J.

2 *Sims v London Necropolis Co* (1885) 1 TLR 584, DC.

3 *Lyde v Russell* (1830) 1 B & Ad 394 (a case of landlord and tenant).

4 *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA.

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85. Unfixed materials and plant in the absence of an express term.

When the property in unfixed materials passes to the employer depends upon the intention of the parties, but generally it will remain in the contractor until the materials are fixed¹. Where the materials are subject to a contract of sale, the delivery of such materials to the site will appropriate them to the contract and pass the property to the person ordering the materials². The mere fact that it would be difficult to remove the materials from the site is not sufficient to show that the property in them has passed³. Where the contract provides that the employer shall pay for unfixed materials delivered to the site, on the certificate of an architect to the effect that they have in fact been delivered, the property in such materials may be intended to pass to the employer on the issue of the certificate or on payment⁴.

Equipment and plant, although not forming part of the permanent works, may in the course of construction become temporarily fixed. Whether the property in such plant and equipment passes to the employer depends on the intention of the parties, but generally the property will remain vested in the contractor⁵. The passing of property in unfixed materials in the above circumstances is, however, defeasible if the contractor fails to fulfil his obligations and the employer consequently rescinds the contract⁶.

1 *Tripp v Armitage* (1839) 4 M & W 687; *Appleby v Myers* (1867) LR 2 CP 651.

2 See eg *Pritchett and Gold and Electrical Power Storage Co Ltd v Currie* [1916] 2 Ch 515, CA. See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 129.

3 *Bellamy v Davey* [1891] 3 Ch 540.

4 *Banbury and Cheltenham Direct Rly Co v Daniel* (1884) 54 LJCh 265; cf, however, *Beeston v Marriott* (1864) 8 LT 690; and *W Hanson (Harrow) Ltd v Rapid Civil Engineering Ltd and Usborne Developments Ltd* (1987) 38 BLR 106. In the latter case it was held that inclusion in an interim certificate indicated only that in the opinion of the architect an advance in respect of those goods should in fairness be made to the contractor. The question depends on the construction of the particular contract.

5 See *Wood v Hewitt* (1846) 15 LJQB 247; *Lancaster v Eve* (1859) 28 LJCP 235 (not building cases); *Partington Advertising Co v Willing & Co Ltd* (1896) 12 TLR 176. If the property in such plant has passed to the employer it does so as security for the contractor's performance and it is implicit that when and if completion is achieved it reverts in the contractor and can be removed: *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690.

6 *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431, [1958] 1 WLR 1126.

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86. Express vesting clauses.

Contracts for construction projects often provide that the property in unfixed materials and even materials not yet on site shall automatically vest in the employer on the happening of a specified event¹. When the property is intended to pass is a question of construction; it is a question of fact whether that stage has been reached². A vesting clause will not pass the property in unfixed materials unless clearly worded³. A vesting clause will not be affected by another clause giving the employer the right to take possession of and use unfixed materials⁴. A clause in terms that unfixed materials are 'to be considered' or 'to be deemed' the property of the employer may not bring about an absolute transfer of property⁵. A clause in terms that unfixed materials are 'to become' the property of the employer will normally transfer the property⁶.

An express term that the property in the materials is to remain in the contractor until payment is ineffective once the materials have been fixed⁷.

Vesting clauses do not constitute bills of sale⁸.

1 The purpose of vesting clauses is to secure to the employer the due performance of the contract: see *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690 at 696 per Farwell J. A vesting clause should be distinguished from forfeiture clauses under which the employer may have power to determine the contract and seize and use materials.

2 *Bennett and White (Calgary) Ltd v Municipal District of Sugar City (No 5)* [1951] AC 786, PC; *Seath v Moore* (1886) 11 App Cas 350 at 370, HL, per Lord Blackburn; *Byford v Russell* [1907] 2 KB 522; *Garrett v Salisbury and Dorset Rly Co* (1866) LR 2 Eq 358.

3 *Baker v Gray* (1856) 17 CB 462 at 479 per Jervis CJ.

4 *Brown v Bateman* (1867) LR 2 CP 272.

5 *Re Winter, ex p Bolland* (1878) 8 ChD 225; *Re Keen and Keen, ex p Collins* [1902] 1 KB 555; *Bennett and White (Calgary) Ltd v Municipal District of Sugar City (No 5)* [1951] AC 786 at 813-814, PC; *Re Cosslett (Contractors) Ltd* [1998] Ch 495, [1997] 4 All ER 115, CA; cf *Brown v Bateman* (1867) LR 2 CP 272; *Re Weibking, ex p Ward* [1902] 1 KB 713; *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690.

6 See *Reeves v Barlow* (1884) 12 QBD 436, CA; *Bennett and White (Calgary) Ltd v Municipal District of Sugar City (No 5)* [1951] AC 786, PC; but cf *Beeston v Marriot* (1864) 8 LT 690.

7 *Re Yorkshire Joinery Co Ltd* (1967) 111 Sol Jo 701.

8 Because a true vesting clause causes ownership to pass, not merely an equitable claim: *Brown v Bateman* (1867) LR 2 CP 272; *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA; *Reeves v Barlow* (1884) 12 QBD 436, CA. It follows that a poorly drafted vesting clause may fail to pass full ownership and may be subject to the Bills of Sale Acts. See *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1633, 1647, 1651.

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87. Effects of transfer of property.

Notwithstanding the transfer of property to the employer by a vesting clause, the contractor retains the right to use unfixed materials for the construction of the works¹. If on the completion of the works there are surplus materials or if materials are removed as not being in accordance with the contract, the property in them will revert in the contractor². After the passing of property, materials cannot be taken in execution of a judgment obtained against the contractor³. Although the vesting clause may be insufficiently clear to pass property in the contractor's plant to the employer, a clause entitling the employer to use the plant to complete the works and then sell it to defray the additional costs incurred in completing the works does not create an equitable charge over the plant⁴.

1 See *Appleby v Myers* (1867) LR 2 CP 651 at 659 per Blackburn J; *Bennett and White (Calgary) Ltd v Municipal District of Sugar City (No 5)* [1951] AC 786, PC.

2 *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690.

3 *Brown v Bateman* (1867) LR 2 CP 272; *Blake v Izard* (1867) 16 WR 108; *Reeves v Barlow* (1884) 12 QBD 436 at 442, CA, per Bowen LJ; cf *Byford v Russell* [1907] 2 KB 522.

4 *Re Cosslett (Contractors) Ltd* [1998] Ch 495, [1997] 4 All ER 115, CA (on the facts the power of sale was a floating charge which was void as against the liquidator for want of registration); approved in *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58, [2002] 1 AC 336, [2002] 1 All ER 292.

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88. Effect of earlier express retention of title clauses.

Under modern conditions a contractor may himself not have acquired title to materials at the time those materials are brought to site or fixed on site, because he gained possession of them under a contract containing a *Romalpa* clause or other retention of title clause¹. Such clauses are common in contracts for the supply of building materials.

Where title has remained in the seller in this way, the original seller may take the benefit of his retention of title clause and deprive an employer or main contractor or sub-contractor of materials already paid for².

A building contract usually results in the extinction of the original title to the materials as they are incorporated into the land, and no retention of title clauses as between employer and main contractor appear in any of the standard forms³. An express term that the property in the materials is to remain in the contractor until payment is ineffective once the materials have been fixed⁴.

Where the contract containing the retention of title clause is one for sale of goods only, the Sale of Goods Act 1979 operates to protect third parties if the original seller has consented to the buyer obtaining possession and the buyer subsequently disposes of them to a third party receiving them in good faith and without notice of the seller's rights⁵. Therefore, in a building contract, an employer acting in good faith and without notice obtains good title against the original seller if the goods are transferred to him under the building contract with the original buyer⁶.

Where materials are mingled in a product by manufacture and lose their separate identity, title in them is extinguished and, although the new product can in theory be subject to a charge, that charge is unlikely to be effective against a third party⁷. In a building contract the fixing of goods or the preparation of goods for fixing are likely so to extinguish the original title.

On its true construction, the retention of title clause may confer no right to the proceeds of a resale⁸, and may contemplate that a valid sale might be made before the buyer has obtained title⁹. In those circumstances the seller will have no remedy against third parties who buy the goods. But where a part of the goods originally sold under the contract containing the retention of title clause remains unfixed, unsold, or otherwise available for repossession by the seller, the mere fact that the seller contemplated resale or consumption by the buyer before payment of the full price does not make the seller's retention of title clause ineffective unless and until resale or consumption takes place¹⁰.

1. See a clause expressly reserving to the seller the title in goods sold and delivered, until payment, as in *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676, CA. As to retention of title clauses generally see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 110.

2. *Dawber Williamson Roofing Ltd v Humberside County Council* (1979) 14 BLR 70, where roofing slates were delivered by the plaintiff sub-contractors for fixing, and their value included in a certificate under the main contract. The defendant employer paid the certificate; the main contractor failed to pay the plaintiff. The employer determined the main contract by reason of the main contractor's liquidation. The plaintiff sued the employer for damages and return of the slates, relying on its retention of title clause. It was held that title in the slates which had never vested in the main contractor could not pass to the defendant employer title in the slates. See also *W Hanson (Harrow) Ltd v Rapid Civil Engineering Ltd and Osborne Developments Ltd* (1987) 38 BLR 106.

3 As to the standard forms of building contracts see para 2 ante.

4 *Re Yorkshire Joinery Co Ltd* (1967) 111 Sol Jo 701; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA; cf *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, [1984] 1 WLR 485. See also the cases on *quicquid plantatur solo, solo cedit*, cited in para 84 note 1 ante.

5 See the Sale of Goods Act 1979 s 25(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 158.

6 *Archivent v Strathclyde Regional Council* (1985) 27 BLR 98, Ct of Sess. The correct ground on which this case should be distinguished from *Dawber Williamson Roofing Ltd v Humberside County Council* (1979) 14 BLR 70 (in which no attempt was made by the defendant employer to rely on the Sale of Goods Act 1979 s 25(1)) has not been made clear by subsequent authority, although several material distinctions exist.

7 *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, [1979] 3 All ER 961, CA. See also the cases on *quicquid plantatur solo, solo cedit*, cited in para 84 ante.

8 Eg it may make no provision for the goods to be kept separate: *Re Andrabell Ltd* [1984] 3 All ER 407. See *Sauter Automation Ltd v Goodman (Mechanical Services) Ltd (in liquidation)* (1986) 34 BLR 81.

9 *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA.

10 *Clough Mill Ltd v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, CA.

UPDATE

88 Effect of earlier express retention of title clauses

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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89. Property in existing materials.

Where the works comprise the replacement of parts of an existing structure, the property in the old materials will not pass to the contractor in the absence of a term in the contract to that effect. If the contractor has agreed to allow in his price for the value of old materials but fails to do so, the employer is entitled to set off such value against the contract price.

Under a building lease, the lessee is entitled to the materials dug out for the purpose of laying the foundations contemplated by the agreement¹. In the absence of express agreement, items of value such as money or antiquities found in the sub-soil are the property of the person in possession of the land². If there is a reservation in respect of minerals, in general everything that can be dug out of the land for the purpose of profit will belong to the grantor subject to the terms and conditions of the reservation³.

1 *Robinson v Milne* (1884) 53 LJCh 1070 (the lessee will not be entitled to materials resulting from overexcavation). If the builder is in possession of land as a licensee under a building agreement entitling him to a lease on completion of the works, he may not take away excavated materials save as required for building purposes: *Pedley v Cooper* (1892) 36 Sol Jo 729.

2 *South Staffordshire Water Co v Sharman* [1896] 2 QB 44; *London Corpn v Appleyard* [1963] 2 All ER 834, [1963] 1 WLR 982.

3 *Hext v Gill* (1872) 7 Ch App 699; *Waring v Foden*, *Waring v Booth Crushed Gravel Co Ltd* [1932] 1 Ch 276, CA.

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90. Extent of lien in building and engineering contracts.

A lien is a right to keep the property of another pending the discharge of a debt. When the right to retain such property is limited to debts outstanding from a particular transaction, it is known as a particular lien; if it is not so limited it is a general lien¹. Liens arise by operation of law.

A lien might arise in favour of the contractor where unfixed materials are in his possession after the property in them has passed to the employer. Otherwise it seems that a true lien cannot arise in building or engineering contracts since both ownership and possession will be in one party or the other. The contractor's right, where the contract so provides, to withhold materials, the property in which has not passed, until the employer has paid for them is sometimes described as a lien². Further, where the contract gives the employer rights less than ownership over unfixed materials or where the employer has advanced money on the security of unfixed materials, the employer is sometimes said to have a 'lien' over such materials even though they remain in the possession of the contractor³. When the property passes, the employer's contractual rights against unfixed materials will merge with his ownership⁴.

1 See generally LIEN.

2 *Bellamy v Davey* [1891] 3 Ch 540; doubted in *Pritchett and Gold and Electrical Power Storage Co Ltd v Currie* [1916] 2 Ch 515, CA.

3 *Re Waugh, ex p Dickin* (1876) 4 ChD 524 (where the employer had taken possession of materials and was held entitled to detain them against the trustee of the contractor); *Banbury and Cheltenham Direct Rly Co v Daniel* (1884) 54 LJCh 265.

4 *Hawthorn v Newcastle-upon-Tyne and North Shields Rly Co* (1840) 3 QB 734n.

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91. Effect of contractor's bankruptcy.

Where by the contract the employer is given a 'lien' on the unfixed materials coupled with a power to seize and use them on the bankruptcy of the contractor, the employer is not protected against the contractor's trustee in bankruptcy¹. He is protected, however, if the 'lien' on the materials has been given from the very commencement of the contract, as then the 'lien' has vested in the employer prior to the bankruptcy². If it is stipulated that the 'lien' is only to arise on the happening of any other event, such as neglect to proceed with the works, and the contractor becomes bankrupt, and the event also happens, the employer can seize the materials on the happening of the event, as the deemed date of the transaction is that of the contract, so that the transaction is protected. But if an execution under a judgment against the contractor is levied on the materials before the event happens, such as a notice of failure to proceed with the works, it is no longer competent for the building owner to acquire a 'lien' by subsequently giving notice³.

1 *Re Harrison, ex p Jay* (1880) 14 ChD 19, CA. A lien is, however, ordinarily effective against a receiver of a company: *George Barker (Transport) Ltd v Eynon* [1974] 1 WLR 462, CA.

2 *Re Waugh, ex p Dickin* (1876) 4 ChD 524; *Re Harrison, ex p Jay* (1880) 14 ChD 19 at 26, CA, per Cotton LJ; both decided under the Bankruptcy Act 1869 (repealed).

3 *Byford v Russell* [1907] 2 KB 522.

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(4) APPROVAL, DEFECTS AND DEFECTIVE MATERIALS

(i) Approval

92. Approval.

The contract may provide that the employer's architect or other person must approve or be satisfied with the performance of the contract by the contractor. In such cases it is a matter of construction whether the contractor's obligation is to meet the requirements of the contract and also obtain the requisite approval or satisfaction or whether one or the other is paramount¹.

¹ *Billyack v Leyland Construction Co Ltd* [1968] 1 All ER 783, [1968] 1 WLR 471; *National Coal Board v William Neill & Son (St Helens) Ltd* [1985] QB 300, [1984] 1 All ER 555, (1983) 26 BLR 81; *Crown Estates Comrs v John Mowlem & Co* (1994) 70 BLR 1, CA. As to certification of satisfaction see para 125 et seq post.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(4) APPROVAL, DEFECTS AND DEFECTIVE MATERIALS/(i) Approval/93. Implication of reasonableness.

93. Implication of reasonableness.

Where the contract provides that the work is to be carried out to the satisfaction or approval of the employer himself, the courts will generally imply that such satisfaction or approval is not to be unreasonably withheld¹ but where it appears from the tenor of the agreement that one party is entitled to withhold approval or satisfaction without reasonable grounds, such an implication will be precluded². Whether an employer has reasonable grounds for withholding approval will depend on the circumstances of the case. Sometimes the contract provides for work to be done to the satisfaction of the employer or the architect. It will be implied that neither could unreasonably refuse to express satisfaction³.

¹ *Dallman v King* (1837) 4 Bing NC 105, DC; *Parsons v Sexton* (1847) 4 CB 899; *Smith v Sadler* (1880) 6 VLR 5; *Docker v Hyams* [1969] 3 All ER 808, [1969] 1 WLR 1060, CA.

² *Stadhard v Lee* (1863) 3 B & S 364, (1863) 32 LJQB 75; and see *Viscount Tredegar v Harwood* [1929] AC 72, HL (this case concerned a landlord's refusal to approve a tenant's choice of an insurance company, but the principle seems to be the same); *Minster Trust Ltd v Traps Tractors* [1954] 3 All ER 136, [1954] 1 WLR 963; cf *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 33 ConLR 72, NSW CA.

³ See paras 92 ante, 129 post. See *Parsons v Sexton* (1847) 4 CB 899; *Andrews v Belfield* (1857) 2 CBNS 779. For approval by certificate see para 125 et seq post.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(4) APPROVAL, DEFECTS AND DEFECTIVE MATERIALS/(i) Approval/94. Matters of taste.

94. Matters of taste.

Aesthetic considerations will often arise in the execution of building work. Where a contractor agrees to carry out work to the aesthetic satisfaction of the employer, there can be no implication that the employer would not unreasonably withhold his approval of the work, for in such circumstances approval is not susceptible of objective ascertainment. The employer must, however, act honestly; he cannot avoid paying the contractor by capriciously withholding approval¹.

¹ *Andrews v Belfield* (1857) 2 CBNS 779; *James Shoolbred & Co v Wyndham and Albery* (1908) Times, 1 December. See also *Docker v Hyams* [1969] 3 All ER 808, [1969] 1 WLR 1060, CA, where cases concerning the provision of ships and goods to the purchaser's approval are considered.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(4) APPROVAL, DEFECTS AND DEFECTIVE MATERIALS/(ii) Defects and Defective Materials/95. Defects.

(ii) Defects and Defective Materials

95. Defects.

A defect commonly means that some of the work or materials does not conform with the requirements of the contract, and thus the contractor is in breach of contract in that respect. However, not every failure to execute the works in accordance with the contract prior to completion is a breach resulting in a breach of contract¹. A contractor may also be under an obligation to warn the building owner or his professional agent of any defect or any deficiencies in the plans or specifications which might result in a defect during the works², or even after completion³. Under some building contracts the contractor may be under an express obligation to put right defects, and failure to afford the contractor the opportunity may constitute a failure to mitigate the claimant's damage⁴.

1 See *Lintest Builders v Roberts* (1978) 10 BLR 120 (affd (1980) 13 BLR 39, CA); *Surrey Heath Borough Council v Lovell Construction Ltd and Haden Young Ltd* (1988) 42 BLR 25 at 34 per Judge Fox-Andrews QC; *Guinness plc v CMD Property Developments Ltd* (1995) 76 BLR 40.

2 *Brunswick Construction Ltd v Nowlan* (1974) 49 DLR (3d) 93, (1974) 21 BLR 27; *Equitable Debenture Assets Corp Ltd v William Moss Group Ltd* (1984) 2 ConLR 1, (1984) 1 Const LJ 131; *Victoria University of Manchester v Hugh Wilson & Lewis Wormsley* (1984) 2 ConLR 43, (1984) 1 Const LJ 162; *University Court of the University of Glasgow v William Whitfield and John Laing (Construction) Ltd* (1988) 42 BLR 66; *Oxford University Press v John Stedman Design Group* (1990) 34 ConLR 1; *Lindenberg v Canning* (1992) 62 BLR 147, (1992) 29 ConLR 71; *Plant Construction plc v Clive Adams Associates* [2000] BLR 137, sub nom *Plant Construction plc v Clive Adams Associates (No 2)* 69 ConLR 106, CA.

3 See *Stag Line Ltd v Tyne Shiprepair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211.

4 In such circumstances the employer will not be able to recover more than the amount which it should have cost the contractor himself to remedy the defects: *Pearce and High Ltd v Baxter* [1999] BLR 101, 66 ConLR 110, CA. As to the duty to mitigate damage see *Hutchinson v Harris* (1978) 10 BLR 19, CA; and DAMAGES vol 12(1) (Reissue) para 1041 et seq.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(4) APPROVAL, DEFECTS AND DEFECTIVE MATERIALS/(ii) Defects and Defective Materials/96. Civil liability for damage caused by defective products.

96. Civil liability for damage caused by defective products.

The Consumer Protection Act 1987 imposes liability for defective products on producers and suppliers. For the purposes of that Act, building and engineering contractors are suppliers of products, but in general will not be producers of products¹.

A contractor is a supplier of goods within the meaning of the Consumer Protection Act 1987 if he performs any contract for work and materials to furnish the goods². So in building contracts to supply and fix items, the contractor is a supplier of those items. The Consumer Protection Act 1987 makes special provision to define the extent of supply in building contracts generally. Execution of a building contract is a supply of goods within the meaning of the Act in so far as, but only in so far as, it involves the provision of any goods by incorporation into the works³. Supply of goods by sale of an interest in land is specifically excluded from the Act⁴. So a builder who repairs or completes a dwelling which is then sold is a supplier of the goods incorporated during the course of his repair or completion work. A builder who builds a complete dwelling is a supplier of all the individual products incorporated in that dwelling. A developer who sells a dwelling he has not built or repaired supplies none of the products in that dwelling⁵.

As a supplier the builder or developer is liable for damage caused by a defect in the product only if he fails to comply with the relevant provisions of the Consumer Protection Act 1987⁶. On the request of the person who suffered the damage to identify one or all of those primarily liable under the Act⁷, he must either identify the person who supplied the product to him, or comply with a request to identify one or more of several specified persons associated with the manufacture and production of the product⁸. The request must be made within a reasonable period after the damage occurred, and at a time when it is not reasonably practicable for the person making the request to identify all of those primarily liable⁹. If the supplier fails to comply with the request or identify his supplier, he will remain liable even if the person suffering the damage subsequently discovers by other means the identity of other potential defendants, since liability is joint and several¹⁰.

1 'Suppliers of products' are defined for the purposes of the Consumer Protection Act 1987 in s 46. Those primarily liable under Pt I (ss 1-9) (as amended) as producers, or as importers into the European Union, or as persons holding themselves out as producers, are defined in ss 1(2), 2(2). The Consumer Protection Act 1987 was passed to give effect to EC Council Directive 85/374 (OJ L210, 7.8.85, p 29) on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, which may be used in the interpretation of the Act and is appended to it: see the Consumer Protection Act 1987 s 1(1), (2). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 518 et seq.

2 See *ibid* s 46(1)(c); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 523.

3 See *ibid* s 46(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 523.

4 See *ibid* s 46(4); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 523.

5 See *ibid* s 1(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.

6 *ie* complies with *ibid* s 2(3): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.

7 *ie* under *ibid* s 2(1), (2): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.

8 See *ibid* ss 1(2), 2(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.

- 9 See *ibid* s 2(3)(b); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.
- 10 See *ibid* s 2(3)(c), (5); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.

UPDATE

96-98 Civil liability for damage caused by defective products ... Criminal liability for defective consumer goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(4) APPROVAL, DEFECTS AND DEFECTIVE MATERIALS/(ii) Defects and Defective Materials/97. Nature and extent of product liability.

97. Nature and extent of product liability.

Product liability is strict in that fault on the part of the defendant is not a necessary element of liability, and the claimant has only to prove supply or production of the product by the defendant, a defect, actionable damage, and causation. However, the Consumer Protection Act 1987 provides six specific defences to liability¹.

A defect exists in a product for the purposes of product liability if the safety of the product is not such as persons are entitled to expect. 'Safety' for these purposes includes safety with respect to property and with respect to other products comprised in that product². All circumstances must be taken into account in judging what degree of safety persons generally are entitled to expect, but certain relevant considerations are explicitly set out in the Consumer Protection Act 1987³. In particular, what might reasonably be expected to be done with or in relation to the product must be considered⁴.

The types of damage for which proceedings may be brought under the Consumer Protection Act 1987 include personal injury, death, and damage to personal property to the value of more than £275⁵. There is no liability under the Act for damage to property not ordinarily intended for private use, occupation, or consumption, or for damage to property not so used, occupied, or consumed by the person suffering damage⁶. There is no liability under the Act for damage to the defective product itself⁷. Liability for damage recoverable under the Act cannot be excluded by any notice or contract term⁸.

The statutory provisions relating to contributory negligence are specifically applied to product liability under the Consumer Protection Act 1987⁹. Specific provision has been made as to the applicable limitation period for a claim for damages in relation to product liability under that Act¹⁰.

1 See the Consumer Protection Act 1987 s 4. The defences are:

- 14 (1) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any European Community obligation (s 4(1)(a));
- 15 (2) that the person proceeded against did not at any time supply the product to another (s 4(1)(b));
- 16 (3) that the only supply by the defendant was not in the course of the defendant's business and the defendant is not a producer or importer (see s 4(1)(c));
- 17 (4) that the defect did not exist in the product at the time the producer or importer last supplied it (ss 4(1)(d), (2), 2(2));
- 18 (5) that at the time the producer or importer last supplied it the state of scientific knowledge was not such that the producer or importer might reasonably have been expected to discover the defect (see s 4(1)(e), (2));
- 19 (6) that the defect was wholly attributable to the design of a subsequent product in which the product was comprised, or to directions to the producer of the product by the producer of the subsequent product in which the product was comprised (see s 4(1)(f)).

Contributory negligence may also afford a partial or complete defence: see s 6(4). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 524.

- 2 See *ibid* s 3(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 522.
- 3 See *ibid* s 3(2). Particular considerations are set out in s 3(2)(a)-(c). See SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 522.
- 4 See *ibid* s 3(2)(b); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 522.
- 5 See *ibid* s 5(1), (4); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 525.
- 6 See *ibid* s 5(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 525.
- 7 See *ibid* ss 5(2), 6; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 521, 525.
- 8 See *ibid* s 7; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 526.
- 9 See *ibid* s 6(4); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 521.
- 10 See *ibid* s 6(6), Sch 1; Limitation Act 1980 s 11A (added by the Consumer Protection Act 1987 s 6(6), Sch 1 para 1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 527.

UPDATE

96-98 Civil liability for damage caused by defective products ... Criminal liability for defective consumer goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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98. Criminal liability for defective consumer goods.

Provisions imposing criminal liability for unsafe goods affect building and engineering contractors engaged on works which will be used for private use and enjoyment.

Criminal liability is imposed on any person who supplies, offers or agrees to supply, or exposes or possesses for supply, any consumer goods¹ which fail to comply with the general safety requirement². Construction and engineering work involves a supply for these purposes if it incorporates goods into the works³. Goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances⁴. A defence of due diligence is available⁵.

Criminal liability is imposed on any person giving, in the course of his business, an indication to a consumer which is misleading as to the price of goods or services⁶. 'Services' for this purpose includes building and engineering services⁷.

1 Consumer goods for this purpose are goods ordinarily intended for private use and consumption: Consumer Protection Act 1987 s 10(7). Specific exceptions are set out in s 10(7)(a)-(f): see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 534.

2 *Ie* under *ibid* Pt II (ss 10-19) (as amended): see s 10(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533. For the details of liability under Pt II (as amended) see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 533, 538.

3 'Supply' is defined in *ibid* s 46 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 523). In relation to building contracts, the performance of any contract by the erection of any building or structure on any land or by the carrying out of any other building works is treated as a supply of goods in so far as, but only in so far as, it involves the provision of any goods to any person by means of their incorporation into the building, structure or works: s 46(3).

4 *Ibid* s 10(2). 'The circumstances' includes the manner of marketing, the 'get-up' of the goods, marks, instructions or warnings (see s 10(2)(a); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533), and includes standards of safety (see s 10(2)(b); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533), and the existence of reasonable means to make the goods safer (see s 10(2)(c); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533). Goods will not be regarded as failing to comply with the general safety requirement in respect of anything attributable to compliance with a European Community obligation, and any failure to do more than is required by safety regulations, or enactments designated under the Consumer Protection Act 1987: see s 10(3) (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 533.

5 See *ibid* s 39; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 537.

6 See *ibid* s 20(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 702.

7 See *ibid* s 22(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 704.

UPDATE

96-98 Civil liability for damage caused by defective products ... Criminal liability for defective consumer goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

98 Criminal liability for defective consumer goods

TEXT AND NOTES--Repealed: SI 2005/1803, SI 2008/1277.

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99. Criminal liability for unsuitable new construction products.

The Construction Products Regulations 1991¹ implement the European Community Directive intended to harmonise health and safety and other requirements relating to construction products². The regulations only apply to products which were first supplied in the European Community on or after 27 December 1991³. The regulations (1) prescribe criminal penalties for the supply of new construction products without the necessary characteristics⁴; (2) prescribe a mark ('CE marking') which identifies products which comply with the Directive⁵; and (3) create supplementary powers of enforcement⁶. A construction product which was supplied for the first time in the European Community on or after 27 December 1991 must either be a 'minor part product'⁷ or have such characteristics that the works in which it is to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements when, where and to the extent that such works are subject to regulations⁸ containing such requirements⁹. The essential requirements are broadly expressed general principles as to mechanical resistance and stability, fire safety, hygiene, health, the environment, safety in use, noise, and energy economy¹⁰.

A product bearing the CE marking is presumed to satisfy the relevant requirement of the regulations¹¹. The CE marking is applied by the manufacturer or first supplier, but the product must comply with certain standards, it must have been attested by one of the appropriate procedures, and it must have been given an EC certificate or declaration of conformity¹².

It is an offence to supply any construction product which fails to satisfy the relevant requirement¹³ of the regulations¹⁴. Various specific powers of enforcement are available to the Secretary of State, customs officers, and the enforcement authorities to issue and serve on particular persons a prohibition, suspension or warning notice in respect of certain products¹⁵, to apply for forfeiture of products¹⁶, to obtain information¹⁷, to make test purchases¹⁸, and to search, seize or detain products¹⁹. A defence of due diligence is available to the offence of supplying a product which fails to satisfy the requirements²⁰ and to certain other offences under the regulations²¹.

1 I.e. the Construction Products Regulations 1991, SI 1991/1620 (as amended); see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 754-755.

2 I.e. EC Council Directive 89/106 (OJ L40, 11.2.89, p 12) on the approximation of laws, regulations and administrative provisions of the member states relating to construction products (amended by EC Council Directive 93/68 (OJ L220, 30.08.93, p 1)).

3 Construction Products Regulations 1991, SI 1991/1620, reg 1(2).

4 See *ibid* reg 5 (as amended), reg 8; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) paras 754-755.

5 See *ibid* reg 5 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754.

6 See *ibid* Pt III (regs 15-23); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

7 The Construction Products Regulations 1991, SI 1991/1620 (as amended) do not apply to minor part products: see reg 3(1). 'Minor part product' means a construction product which is included in a list of products which play a minor part with respect to health and safety drawn up, managed and revised periodically by the European Commission: reg 2(1). In addition, they must have been manufactured in compliance with, and the

manufacturer must have issued in respect of the product a declaration of compliance with, the acknowledged rule of technology: reg 3(2). 'The acknowledged rule of technology' means technical provision acknowledged by a majority of representative experts as reflecting the developed stage of technical capability at a given time as regards products, processes and services, based on the relevant consolidated findings of science, technology and experience: reg 2(1). See further SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754.

8 For these purposes, 'regulations' includes any rule, regulation or other provision which has the force of law: *ibid* reg 3(2).

9 *Ibid* reg 3(1).

10 See EC Council Directive 89/106 (OJ L40, 11.2.89, p 12) Annex 1 (amended by EC Council Directive 93/68 (OJ L220, 30.08.93, p 1)). The annex is reproduced in the Construction Products Regulations 1991, SI 1991/1620, reg 2(1), Sch 2 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754).

11 See *ibid* reg 4 (as substituted); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754.

12 See *ibid* reg 5 (amended by SI 1994/3051); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754. The CE markings are reproduced in the Construction Products Regulations 1991, SI 1991/1620, reg 2(1), Sch 1 (as substituted). The CE marking may be applied by the manufacturer in the closely defined circumstances set out in reg 5(1) (as amended). Detailed requirements of attestation, compliance with EC directives, and compliance with national or EC standards are set out in reg 5(1) (as amended), Sch 3. An EC certificate or declaration of conformity must have been issued or made: see reg 5(1) (as so amended). Certificates of conformity can be issued only by bodies approved by a member state and notified as competent to the EC Commission: see Sch 3 paras 2, 3. Declarations of conformity can be issued by the manufacturer: see Sch 3 paras 4, 5. The CE marking must be accompanied with sufficient information to enable the manufacturer to be easily identified: see reg 5(2) (as so amended). It is an offence punishable with imprisonment to make a declaration of conformity, or affix or pass off an CE marking or forged CE marking, in breach of reg 5 (as amended) or its equivalents in other member states: see reg 5(3) (as so amended). A person who affixed the CE marking, or the first United Kingdom supplier of a product marked elsewhere, must keep the EC certificate or declaration of conformity available for inspection by an enforcement authority: see reg 6 (amended by SI 1994/3051). See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754. Suppliers of unmarked products are required to give information to enable an enforcing officer to ascertain whether a product satisfies the Construction Products Regulations 1991, SI 1991/1620, reg 3 (see the text and notes 7-9 *supra*) and/or whether it is subject to reg 3: see reg 7 (amended by SI 1994/3051). See also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 754. For the meaning of 'United Kingdom' see para 25 note 10 *ante*.

13 See the requirements of the Construction Products Regulations 1991, SI 1991/1620, reg 3: see the text and notes 7-9 *supra*.

14 *Ibid* reg 8(1). Whether an offence has been committed will depend on the novelty of the product, the application of reg 3, and the existence of an EC mark. The offence is triable summarily and punishable by three months' imprisonment or a fine not exceeding level 5 on the standard scale or both: see reg 8(4); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755. Special defences are provided for persons who did not believe the product would be used in the European Community, for retailers of second hand goods, and for retailers with no knowledge and no reasonable grounds for believing that reg 3 was not satisfied: see reg 8(2), (3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

15 See the Construction Products Regulations 1991, SI 1991/1620, regs 9, 10; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755. As to appeals against suspension notices see reg 11; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

16 See *ibid* reg 12; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

17 See *ibid* reg 14; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

18 See *ibid* reg 16; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

19 See *ibid* regs 17-19; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 755.

20 le the requirements of *ibid* reg 3: see the text and notes 7-9 *supra*.

21 See *ibid* reg 26. The defence does not apply to such offences as obstructing an authorised officer acting in pursuance of the regulations: see reg 26. See further *SALE OF GOODS AND SUPPLY OF SERVICES* vol 41 (2005 Reissue) paras 754-755.

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(5) OBLIGATIONS OF THE EMPLOYER

100. Duties towards contractor.

An employer under a building contract will normally be subject to the usual implied obligations as to co-operation¹. Thus, if instructions, drawings, etc are to be supplied, the employer must provide them within a reasonable time². What is a reasonable time will depend on the circumstances. If drawings and plans are not supplied, then the contractor should apply for them³. The fact that the contractor has applied to the employer for the issue of plans and drawings is material to the question whether the drawings were supplied at a reasonable time⁴. Where the employer fails to provide drawings, the contractor is entitled to damages and, if appropriate, an extension of time for the completion of the works⁵.

1 *Mackay v Dick* (1881) 6 App Cas 251, HL; *Merton London Borough Council v Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

2 *Neodox v Swinton and Pendlebury Borough Council* (1958) 5 BLR 34; *SJ and MM Price Ltd v Milner* (1968) 206 Estates Gazette 313; *Holland Hannen and Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80. See also *Royal Brompton Hospital National Health Trust v Hammond* [2000] BLR 75 (engineers had duty to provide co-ordination drawings to contractor so as to ensure employer complied with its duty to provide corresponding information).

3 *Stevens v Taylor* (1860) 2 F & F 419.

4 *Neodox v Swinton and Pendlebury Borough Council* (1958) 5 BLR 34. Although, within limits, it is for the contractor to decide when working drawings and details are required: *Wells v Army & Navy Co-operative Society* (1902) 86 LT 764 (the contractor cannot unilaterally determine what is a reasonable time; his stated requirements are a material factor but not determinative). See also *Glenlion Construction Ltd v Guinness Trust* (1987) 39 BLR 89 (no implied term that the employer should enable the contractor to finish earlier than the contractual completion date).

5 *Re Trollope & Sons and Colls Ltd and Singer* (1913) 1 Hudson's BC (4th Edn) 849. In the absence of an extension of time clause, delay in giving working drawings will invalidate the date for completion and any right to liquidated damages for delay. As to extension of time and liquidated damages see para 69 et seq ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(5) OBLIGATIONS OF THE EMPLOYER/101. Appointment of architect or engineer.

101. Appointment of architect or engineer.

Where the contract provides that work is to be done under the superintendence of the employer's architect or engineer, and no architect or engineer is named in the contract, the appointment of an architect or engineer is a condition precedent to the contractor's obligation to carry out the work¹.

If the original architect dies or becomes incapable the employer is under a duty to the contractor to appoint another, presumably within a reasonable time. It is normally also an implied term of the contract that the architect will discharge the functions for which he has been appointed², and if he does not do so another must be appointed³. The absence of a person to perform the functions of the architect affords the employer no defence to a claim for an amount which the architect ought to have certified⁴.

In many contracts for large works, the employer may also be entitled to appoint a clerk of works⁵ or other supervisor; but unless the contract gives the clerk of works powers and duties in relation to the contractor, it is submitted that the failure of the employer to appoint a clerk of works is immaterial.

1 *Coombe v Green* (1843) 11 M & W 480; *Hunt v Bishop* (1853) 8 Exch 675. Some contracts provide that if the architect should cease to act, the employer should appoint another. In such a case, the failure of the employer to appoint a second architect within a reasonable time would be a breach entitling the contractor to refuse further performance. As to the employment of architects and engineers see para 241 et seq post.

2 *Frederick Leyland & Co Ltd v Compania Panamena Europea Navigacion Limitada* (1943) 76 Ll L Rep 113, CA; affd sub nom *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Co)* [1947] AC 428, HL; *Perini Corpn v Commonwealth of Australia* (1969) 12 BLR 82. Such a term may not be implied if the contract contains a relevant arbitration clause: *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 39, (1986) ConLR 85, CA.

3 *Merton London Borough Council v Stanley Hugh Leach Ltd* (1985) 32 BLR 51; *Kellett v Stockport Corpn* (1906) 70 JP 154.

4 *Croudace v Lambeth London Borough Council* (1986) 33 BLR 20, CA.

5 As to the clerk of works see para 6 ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(5) OBLIGATIONS OF THE EMPLOYER/102. Duty to provide the site.

102. Duty to provide the site.

The employer must give the contractor possession of the site on the agreed date or, if no date is specified, within a reasonable time¹. The provision of the site is a condition precedent to the contractor's obligation to carry out the work². If, however, the contractor starts work at a later date than that agreed, because of delay on the part of the employer, he is deemed to have waived his right to treat the occupation of the site as a condition precedent or to have affirmed the contract; he is then confined to a remedy in damages³. Where delay in giving possession of the site is caused by the wrongful interference of a third party with the access to the site, the contractor may have no remedy against the employer⁴.

Generally the contractor's right to the possession of the site amounts to a licence and not to an interest in land⁵. During the progress of the work, such licence may be irrevocable⁶. An interim injunction will not necessarily be granted to expel the contractor from the site where the employer seeks to revoke the licence and there is a bona fide dispute as to whether the employer is entitled under the contract to expel the contractor⁷.

The employer gives no implied undertaking that the site is suitable for the execution of the works⁸. Nor does the employer warrant that the site complies with health and safety requirements⁹.

1 *Freeman & Son v Hensler* (1900) 64 JP 260, CA; *R v Walter Cabott Construction Ltd* (1975) 69 DLR (3d) 542, (1975) 21 BLR 42, Can CA.

2 *Arterial Drainage Co Ltd v Rathangan River Drainage Board* (1880) 6 LR Ir 513.

3 *Roberts v Bury Improvement Comr* (1870) LR 5 CP 310. See generally DAMAGES.

4 *Porter v Tottenham UDC* [1915] 1 KB 776, CA; *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981) 24 BLR 127; but see *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 29 BLR 5, CA (employer in breach of JCT contract where two people and a dog were squatting in a car on the site).

5 See also para 120 post.

6 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326; cf *Porter v Hannah Building Pty Ltd* [1969] VR 673, Vic SC; and *Surrey Heath Borough Council v Lovell Construction Ltd* (1988) 42 BLR 25 at 51. As to the revocation of a contractor's licence to occupy the site see para 120 post.

7 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326. However, the result of this decision would now be inconsistent with a proper application of the principles in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL. It has also been criticised: see eg (1971) 87 LQR 309; *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309; *Graham H Roberts Pty Ltd v Naurbeth Investments Pty Ltd* [1974] 1 NSWLR 93. See also *Surrey Heath Borough Council v Lovell Construction Ltd* (1988) 42 BLR 25; *A-G of Hong Kong v Ko Hon Mau* (1988) 44 BLR 144; *Tara Civil Engineering v Moorfield Developments Ltd* (1989) 46 BLR 72.

8 *Appleby v Myers* (1867) LR 2 CP 651; *Bottoms v York Corpn* (1892) 2 Hudson's BC (4th Edn) 208, CA.

9 *Allridge (Builders) Ltd v Grand Actual Ltd* (1996) 55 ConLR 91 at 122 per Mr Recorder David Blunt QC.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(5) OBLIGATIONS OF THE EMPLOYER/103. Duty to carry out work and supply materials at the right time.

103. Duty to carry out work and supply materials at the right time.

Part of a proposed building may be excluded from the contract and the employer may choose to carry out that work himself or by other contractors, or it may be a term of the contract that the employer should supply the contractor with materials. In such circumstances it will, in general, be an implied term of the contract that neither the employer nor his direct contractors or suppliers will hinder the contractor in the performance of the contract nor prevent its completion¹. However, where, with the consent of the contractor, an employer arranged for the supply of materials which the contractor was bound to supply and it was agreed that the price of the materials would be deducted from the contract price, the employer was held not liable when the materials were delivered late².

1 *MacIntosh v Midland Counties Rly Co* (1845) 14 M & W 548; *Yates v Law* (1866) 25 UCR 562, Ont CA; *Lawson v Wallasey Local Board* (1882) 11 QBD 229, DC; affd (1883) 48 LT 507, CA. The implied term might, it is submitted, be excluded where the contract provides that the contractor should co-ordinate his work with that of other contractors. In circumstances where the materials supplier has no direct contract with the contractor, interference by the employer in the supply of goods necessary for the contract will be a breach of the implied term: *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175 at 1178-1179, [1971] 1 WLR 1676 at 1680, CA, per Lord Denning MR.

2 *WH Gaze & Sons Ltd v Port Talbot Corp* (1929) 93 JP 89. See also *Simplex Concrete Piles Ltd v St Pancras Borough Council* (1958) 14 BLR 80.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(6) BUILDING AND ENVIRONMENTAL CONTROLS/(i) Building Control/104. Planning permission and the building regulations.

(6) BUILDING AND ENVIRONMENTAL CONTROLS

(i) Building Control

104. Planning permission and the building regulations.

Where the work which is to be carried out under a building contract involves development within the meaning of the Town and Country Planning Act 1990¹, it is unlawful to begin the work without first obtaining planning permission². Second, it is necessary to submit the plans and drawings to the local authority so that the authority can approve them as complying with the provisions relating to building regulation³. If work is carried out without such permission, the relevant authority may require the work to be taken down⁴. It is usual for building contracts expressly to provide that the contractor should comply with such statutory obligations, but even without such a term a court might find the contractor, who does not satisfy himself that the requirements of any statute affecting the work have been complied with, to be in breach of an implied term that the work is to be carried out in a good and workmanlike manner⁵.

1 'Development' is defined as involving the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land: see the Town and Country Planning Act 1990 s 55(1). The demolition of houses does not constitute development within the meaning of s 55(1): *Cambridge City Council v Secretary of State for the Environment* [1992] 21 EG 108, CA. In some cases no application need be made: see generally TOWN AND COUNTRY PLANNING.

2 See the Town and Country Planning Act 1990 s 57(1). An offence is committed at a later stage when an enforcement notice or stop notice is not complied with: see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) paras 561 et seq, 577 et seq.

3 As to building regulations see BUILDING. In London, the provisions relating to building regulation now largely apply, although some provisions of the London Building (Amendment) Act 1939 remain in force: see the Building Regulations (Inner London) Regulations 1985, SI 1985/1936 (amended by SI 1986/452; SI 1987/798; SI 1991/2768; and SI 2000/2532); and the Building Regulations (Inner London) Regulations 1987, SI 1987/798 (amended by SI 1991/2768; and SI 2000/2532); and BUILDING. The Building Act 1984 s 38 creates civil liability for breach of building regulations in that, subject to the provisions of s 38, breach by a builder of a duty imposed by the building regulations is, so far as it causes damage, actionable unless the regulations provide otherwise: see BUILDING.

4 See the Town and Country Planning Act 1990 s 172 (as substituted); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) para 561 et seq. Work may also be subject to a stop notice: see s 183 (as substituted); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) para 577 et seq.

5 See para 76 ante. Carrying out work in breach of the building regulations may also amount to an offence: see the Building Act 1984 s 35; and BUILDING.

UPDATE

104 Planning permission and the building regulations

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(6) BUILDING AND ENVIRONMENTAL CONTROLS/(i) Building Control/105. Where consent or approval is not given.

105. Where consent or approval is not given.

The planning authority may refuse permission for the execution of the work described in the contract. Whether in that event the employer is in breach of contract and liable to the contractor in damages depends on the construction of the contract¹. If the employer has expressly or impliedly undertaken to obtain the permission and that undertaking is absolute, the employer is liable if permission is not obtained². In most cases, however, the contract will be conditional on permission being granted and if it is not forthcoming, both parties will be discharged³.

Where plans are not approved for the purposes of the provisions relating to building regulation⁴ the position may be different where the employer has power to vary the work described in the contract⁵. It will usually be possible to obtain approval by exercising that power and altering the work.

1 *Smith v Harwich Corp* (1857) 2 CBNS 651; *Re Northumberland Avenue Hotel Co, Fox and Braithwaite's Claim* (1887) 56 LT 883, CA; *Bywaters & Sons v Curnick & Co* (1906) 2 Hudson's BC (4th Edn) 393, CA; *Ellis-Don Ltd v Parking Authority of Toronto* (1978) 28 BLR 98, Ont SC.

2 Cf *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, CA (which relates to export licences). Cf *Agroexport State Enterprise for Foreign Trade v Cie Européenne de Céréales* [1974] 1 Lloyd's Rep 499; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565, [1987] 2 Lloyd's Rep 342, CA.

3 Cf *Lehmann v McArthur* (1868) 3 Ch App 496, where a contract to assign a lease was discharged on the failure of the lessee, after taking reasonable steps, to obtain the landlord's consent; but see *Day v Singleton* [1899] 2 Ch 320, CA.

4 As to building regulation see BUILDING.

5 For the power to vary the contract see para 74 ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(6) BUILDING AND ENVIRONMENTAL CONTROLS/(ii) Environmental Control/106. Nuisance.

(ii) Environmental Control

106. Nuisance.

A claim for private nuisance is only maintainable by a person having an interest in the land affected by the alleged nuisance¹. In relation to building and engineering work, nuisance consists of acts or omissions generally connected with the use or occupation of land which causes damage to another person in connection with that other person's use of land or interference with the enjoyment of land or of some other rights connected with the land. It also consists of acts or omissions which have been designated or treated by statute as nuisances. Building operations may give rise to liability in nuisance in many ways. Particular examples are: noise from building works and vibration from, for example, pile driving, the creation of dust and constant heavy traffic to and from the site².

The demolition of a building resulting in exposure of a neighbouring building to the elements is not a nuisance³ unless the building is subject to an entitlement to support or maintenance⁴. Equally, the lowering of the water table by dewatering is not a nuisance⁵. However, a landowner may be liable in nuisance if, by mere omission, his neighbour's rights of support are adversely affected⁶.

The ordinary use of residential premises could not constitute a nuisance unless the use was unusual or unreasonable having regard to the purpose for which the premises were constructed⁷.

1 *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL. In relation to claims for private nuisance in connection with building works, 'actionability at common law depends on showing that the building works were conducted without reasonable consideration for the neighbours': *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1 at 13, [2000] 3 All ER 289 at 300, HL, per Lord Hoffmann. As to nuisance generally see NUISANCE vol 78 (2010) PARA 101 et seq.

2 See further NUISANCE vol 78 (2010) PARA 124 et seq; and *Harrison v Southwark & Vauxhall Water Co* [1891] 2 Ch 409; *Andreae v Selfridge & Co Ltd* [1938] Ch 1, CA; *Ellison v Ministry of Defence* (1996) 81 BLR 101.

3 *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA.

4 *Marchant v Capital and Counties plc* (1983) 267 Estates Gazette 843, CA; *Bradburn v Lindsay* [1983] 2 All ER 408.

5 *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424, [1970] 1 WLR 161. However, repeated flooding of a house and garden caused by the operations of a statutory sewerage undertaker may constitute a nuisance and an interference with an owner's rights under the Human Rights Act 1998: *Marcic v Thames Water Utilities Ltd* [2002] EWCA Civ 65, [2002] 2 All ER 55, [2002] 2 WLR 932. For further examples of activities which have or have not been held to be nuisances, and for defences, see NUISANCE vol 78 (2010) PARAS 101 et seq, 192 et seq.

6 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, [2000] BLR 109, CA.

7 *Baxter v Camden London Borough Council (No 2)* [2001] QB 1 at 12, sub nom *Baxter v Camden London Borough Council* [1999] 1 All ER 237 at 244, CA, per Tuckey LJ; affd sub nom *Southwark London Borough Council v Tanner* [2001] 1 AC 1, sub nom *Southwark London Borough Council v Mills* [1999] 4 All ER 449, HL.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(6) BUILDING AND ENVIRONMENTAL CONTROLS/(ii) Environmental Control/107. Noise.

107. Noise.

A local authority exercises special control over noise in respect of: (1) the erection, construction, alteration, repair or maintenance of buildings, structures or roads; (2) breaking up, opening or boring under any road or adjacent land in connection with the construction, inspection, maintenance or removal of works; (3) demolition and dredging works; and (4) whether or not also comprised in heads (1) to (3) above, any work of engineering construction¹. In such situations the authority may serve a notice imposing requirements as to the way the works are to be carried out².

The fact that such a notice has been served prescribing the hours during which noisy work can be done does not affect the common law rights of neighbouring owners who may, in appropriate cases, obtain interim injunctions restraining work in more restrictive terms than those contained in the notice³. If a person contravenes any requirement of such a notice, he is guilty of an offence⁴ and may be made the subject of an injunction if criminal proceedings are wholly inadequate⁵. Statutory nuisances, occurring on a construction site, including nuisances caused by noise, dust and effluence, can be made the subject of a complaint to a magistrates' court by a local authority⁶ or by persons aggrieved⁷ by the nuisance⁸.

¹ Control of Pollution Act 1974 s 60(1); and see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 835. See also the Environmental Protection Act 1990; and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH; NUISANCE vol 78 (2010) PARA 124 et seq; TOWN AND COUNTRY PLANNING.

² See the Control of Pollution Act 1974 s 60(2). The notice must be served on the person carrying out the work, it is not sufficient that the notice came to the attention of that person: *Amec Building Ltd v Camden London Borough Council* (1996) 55 ConLR 82. For the content of these notices, appeals against these notices, prior consent to provisions relating to the control of noise and appeals as to prior consent see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 825 et seq.

³ *Lloyds Bank plc v Guardian Assurance plc and Trollope and Colls Ltd* (1986) 35 BLR 34, CA; *City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, (1988) 49 BLR 1, CA.

⁴ See the Control of Pollution Act 1974 s 60(8). As to the penalties see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 822. A notice only applies to works being carried out or to be carried out at the date of the notice. A fresh notice is required for works on the same site under a separate, later contract: *Walter Lilly & Co Ltd v Westminster City Council* (1994) CILL 937, DC.

⁵ *City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, (1988) 49 BLR 1, CA.

⁶ See the Environmental Protection Act 1990 s 80 (as amended); and NUISANCE vol 78 (2010) PARA 200 et seq.

⁷ As to persons aggrieved see JUDICIAL REVIEW vol 61 (2010) PARA 656.

⁸ See the Environmental Protection Act 1990 s 82 (as amended); and NUISANCE vol 78 (2010) PARA 210 et seq.

UPDATE

107 Noise

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(6) BUILDING AND ENVIRONMENTAL CONTROLS/(ii) Environmental Control/108. Trespass.

108. Trespass.

An unlawful entry by one person on land in the possession of another is a trespass for which a claim may be brought¹. On building sites, tower cranes are frequently used and the oversailing of the jib over neighbouring property is a trespass since the ownership of land includes ownership of the air up to the sky². Thus, an adjoining owner can compel a contractor to desist from oversailing his air space and the contractor cannot resist an injunction by reliance upon the balance of convenience³. Any licence granted to allow oversailing will be personal to the adjoining owner and will not bind subsequent purchasers unless it is granted in the form of an easement and is registered⁴. The working of minerals below the surface of another's land amounts to a trespass⁵. Damages together with or in lieu of an injunction may be awarded against the trespasser, even without proof of damage⁶.

1 See TORT vol 97 (2010) PARA 562 et seq.

2 *Kenyon v Hart* (1865) 6 B & S 249; *Wandsworth Board of Works v United Telephone Co* (1884) 13 QBD 904, CA; *Gifford v Dent* [1926] WN 336; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 3 All ER 343. See also *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479, [1977] 2 All ER 902. As to the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* see BOUNDARIES vol 4(1) (2002 Reissue) para 902.

3 *Graham v KD Morris and Sons Property Ltd* [1974] Qd R 1, Qld SC; *Anchor Brewhouse Development Ltd v Berkley House Docklands Developments Ltd* (1987) 38 BLR 82; *London and Manchester Assurance Co Ltd v O and H Construction Ltd* [1989] 2 EGLR 185, 6 Const LJ 155. See, however, *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411, where the injunction was granted but suspended for a period that allowed the defendant a reasonable period of time to complete the work requiring the use of the tower crane. Absent special circumstances, it is doubtful whether such suspension is correct: see *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* (1987) 38 BLR 82.

4 See EASEMENTS AND PROFITS A PRENDRE.

5 *Smith v Lloyd* (1854) 9 Exch 562 at 574 per Parke B.

6 *Patel v WH Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA. See generally TORT vol 97 (2010) PARAS 589-590.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/(6) BUILDING AND ENVIRONMENTAL CONTROLS/(ii) Environmental Control/109. Other heads of liability.

109. Other heads of liability.

The carrying out of works of construction may involve the employer in liability to adjoining landowners, in nuisance¹ or under the rule in *Rylands v Fletcher*². A local authority is empowered by statute to serve a notice³ specifying the way in which building works are to be carried out, so as to minimise inconvenience to those in the locality. An occupier is absolutely liable for the maintenance of any part of a building which projects over the highway⁴; and if in the course of carrying out building operations in or near a street an accident occurs which gives rise to the risk of serious bodily injury⁵ to a passer-by, the owner of the land or building on which the building operation is being carried out may be guilty of an offence and liable on summary conviction to a fine⁶. Except possibly in some cases of nuisance⁷, it is not a defence to these causes of action that the damage was caused by an independent contractor unless the negligence of the independent contractor was collateral to the purpose for which he was employed⁸. The performance of a statutory duty cannot be delegated by the employer to the contractor⁹.

1 See eg *Andreae v Selfridge & Co Ltd* [1938] Ch 1, [1937] 3 All ER 255, CA; *Spicer v Smeeth* [1946] 1 All ER 489; *Brybrook Barn Centre Ltd v Kent County Council* [2001] BLR 55, CA; paras 106-107 ante; and NUISANCE vol 78 (2010) PARAS 124 et seq, 164 et seq; NEGLIGENCE.

2 See eg *Hoare & Co v McAlpine* [1923] 1 Ch 167; *Rylands v Fletcher* (1868) LR 3 HL 330. As to the rule in *Rylands v Fletcher* see NUISANCE vol 78 (2010) para 148.

3 See the Control of Pollution Act 1974 s 60; and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 835. See, in relation to noise, para 107 ante. See generally, as to penalties in relation to contravention of such a notice, ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 822.

4 *Tarry v Ashton* (1876) 1 QBD 314; and see NEGLIGENCE vol 78 (2010) PARA 61.

5 Or would have given rise to such a risk but for the fact that the highway authority or local authority took steps to ensure that if an accident occurred it would not give rise to the risk of serious bodily injury: see the Highways Act 1980 s 168(1)(b) (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 372.

6 See the Highways Act 1980 s 168(1); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 372. The fine imposed must not exceed level 5 on the standard scale: s 168(1) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see para 99 note 14 ante. As to defences see the Highways Act 1980 s 168(3); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) para 372.

7 *Bower v Peate* (1876) 1 QBD 321 at 326-327 per Cockburn CJ.

8 *Padbury v Holliday and Greenwood Ltd* (1912) 28 TLR 494, CA. Cf *Holliday v National Telephone Co* [1899] 2 QB 392, CA.

9 *Gray v Pullen* (1864) 5 B & S 970. As to delegation of the performance of a statutory duty see further TORT vol 97 (2010) PARA 505.

UPDATE

109 Other heads of liability

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4,

Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/2. PERFORMANCE OF THE CONTRACT/ (7) NON-COMPLETION, TERMINATION AND INSOLVENCY/(i) Illegality/110. Types of illegality.

(7) NON-COMPLETION, TERMINATION AND INSOLVENCY

(i) Illegality

110. Types of illegality.

Contracts may be illegal either as formed or as performed¹. A contract to perform an act, which is at the time of the contract illegal, is void². In such a case, the employer cannot seek to recover payments made under the illegal contract³, nor can the contractor claim the contract price⁴. Thus a contractor cannot claim the value of work carried out in excess of that permitted by a licence⁵, but if the employer expressly undertakes that he will obtain the necessary licence and the contractor reasonably relies on the employer to do so, the contractor will have a claim for breach of a collateral warranty should it prove that the employer has failed to obtain the appropriate licence⁶. A building or engineering contract may be illegal by reason of a failure to comply with a statute or it may be prohibited by statute. Thus it is generally illegal to build on a disused burial ground⁷; and, where a statute required a construction not to be built of wood, a contract to build in such material was unenforceable⁸. When statutory control of building work was operative, it was illegal to carry out building work without first obtaining the appropriate licence⁹.

Where, however, the illegality lies only in the method of performing the contract, the contractor will not lose his right of action on the contract unless from the outset he intended to perform it in an illegal manner¹⁰. In some contracts it is an express term that the contractor will comply with any relevant statute, statutory regulation and byelaw. If the employer suffers loss as a result of the contractor's failure to perform the contract in accordance with such statute or regulation the contractor will be liable to the employer in damages. So too where the illegality lies in the method of execution chosen by the contractor there will be no fundamental illegality¹¹. A contract may not itself be illegal but it may be tainted with illegality by reason of its connection with some other illegal transaction. If the illegality is merely incidental to the primary purpose of the transaction it will be enforced but if the claim is founded directly upon the illegality it is likely to fail¹².

1 See generally CONTRACT.

2 *Bartlett v Vinor* (1692) Carth 251 at 252 per Holt CJ. As to illegal contracts see CONTRACT vol 9(1) (Reissue) para 869 et seq.

3 See *Kearley v Thomson* (1890) 24 QBD 742 at 745-746, CA, per Fry LJ; *A Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 QB 319 at 328, [1952] 1 All ER 1008 at 1012, CA, per Denning LJ.

4 *Stevens v Gourley* (1859) 7 CBNS 99 (contract to build in wood when the use of such material was prohibited); *Barton v Piggott* (1874) LR 10 QB 86; *Taylor v Bhail* (1995) 50 ConLR 70, CA.

5 *Brightman & Co Ltd v Tate* [1919] 1 KB 463; *Bostel Bros Ltd v Hurlock* [1949] 1 KB 74, [1948] 2 All ER 312, CA; *Dennis & Co Ltd v Munn* [1949] 2 KB 327, [1949] 1 All ER 616, CA; *Woolfe v Wexler* [1951] 2 KB 154, [1951] 1 All ER 635, CA; *A Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 QB 319, [1952] 1 All ER 1008, CA; *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA; *Frank W Clifford Ltd v Garth* [1956] 2 All ER 323, [1956] 1 WLR 570, CA; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216, [1987] 2 All ER 152, CA; *Mohamed v Alaga & Co* [1998] 2 All ER 720.

6 *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525, [1955] 3 All ER 90, CA.

7 *Gibbons v Chambers* (1885) 1 TLR 530; *Re Trustees of St Saviour's Rectory and Oyler* (1886) 31 ChD 412; *Re Ponsford and Newport District School Board* [1894] 1 Ch 454, CA. As to when buildings may be erected on a disused burial ground see CREMATION AND BURIAL vol 10 (Reissue) para 1146.

8 *Stevens v Gourley* (1859) 7 CBNS 99.

9 Eg under the Building Control Act 1966 (repealed).

10 *St John Shipping Corp v Joseph Bank Ltd* [1957] 1 QB 267, [1956] 3 All ER 683; and see *Townsend's (Builders) Ltd v Cinema News and Property Management Ltd* [1959] 1 All ER 7, [1959] 1 WLR 119, 20 BLR 118, CA, where it was held that work done in contravention of byelaws was not illegal work if the local authority was prepared to allow it to remain on the employer's undertaking to carry out further work to cure the defects. See also *Shaw v Groom* [1970] 2 QB 504, [1970] 1 All ER 702, CA; *SA Ancien Maison Marcel Bauche v Woodhouse Drake and Carey (Sugar) Ltd* [1982] 2 Lloyd's Rep 516; *Phoenix General Insurance Co of Greece v Halvanon Insurance Co Ltd* [1988] QB 216, [1987] 2 All ER 152, CA.

11 *Townsend's (Builders) Ltd v Cinema News and Property Management Ltd* [1959] 1 All ER 7, [1959] 1 WLR 119, 20 BLR 118, CA.

12 *Thackwell v Barclays Bank plc* [1986] 1 All ER 676; *Saunders v Edwards* [1987] 2 All ER 651 at 666, [1987] 1 WLR 1116 at 1134, CA, per Bingham LJ; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, CA; *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL.

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111. Supervening illegality.

Where, during the course of the works, it becomes illegal to perform the contract at all, the contract will be frustrated and both parties will be discharged¹. However, the contract will not necessarily be frustrated where the illegality affects only one of the contractor's obligations or the time at which the contract is to be performed². If the execution of the works is rendered illegal for a period of time longer than any delay contemplated by the parties at the time of the contract, the contract will be frustrated³. If an ancillary or subsidiary part of a contract is illegal, it may be possible to sever the illegal part and enforce the lawful remainder. The court will consider the substance of the transaction concerned to determine whether the contract is divisible⁴.

1 See para 113 post. As to frustration generally see CONTRACT vol 9(1) (Reissue) para 897 et seq.

2 See eg *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL.

3 *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, HL. See also *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, Aust HC.

4 *Carney v Herbert* [1985] AC 301, [1985] 1 All ER 438, PC; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 All ER 897, CA; *Taylor v Bhail* (1995) 50 ConLR 70, CA.

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(ii) Impossibility of Performance

112. Impossibility.

Factors existing at the time of the contract may make its performance wholly or partly impossible¹. It may prove impossible to construct the works at all or to do so by the proposed method of construction. Where it is impossible to carry out the works at all, it is a question of construction whether the parties intended that the contract should in such circumstances cease to bind them². If the contractor has expressly or impliedly undertaken to complete the contract, he will be liable in damages in the event of his failing to do so, notwithstanding that the completion of the works may have proved impossible³.

If the method of constructing the works proves impossible, the contractor must adopt another method. The contractor is not entitled to abandon the contract because the employer refuses to make additional payment in respect of additional expense incurred by the contractor in adopting a more effective and expensive method⁴. Further, the employer does not warrant that his architect's design is practicable and he is not liable to the contractor should the design prove impracticable⁵.

1 As to impossibility of performance see CONTRACT vol 9(1) (Reissue) para 897 et seq.

2 A contract will not be construed as an undertaking to perform an impossibility if any other reasonable construction is possible: *Lord Clifford v Watts* (1870) LR 5 CP 577 at 585 per Willes J. The contract may expressly provide that the contractor must construct and complete the works save in so far as it is legally or physically impossible to do so: see eg the ICE conditions of contract. As to standard forms of contract see para 2 ante.

3 *Jones v St John's College Oxford* (1870) LR 6 QB 115 at 127 per Hannen J; *Taylor v Caldwell* (1863) 3 B & S 826 at 833 per Blackburn J.

4 See para 63 ante. See also *Jackson v Eastbourne Local Board* (1886) 2 Hudson's BC (4th Edn) 81, HL; *Bottoms v York Corpn* (1892) 2 Hudson's BC (4th Edn) 208, CA; *McDonald v Workington Corpn* (1893) 9 TLR 230, CA.

5 *Thorn v London Corpn* (1876) 1 App Cas 120, HL; *Tharsis Sulphur and Copper Co v M'Elroy & Sons* (1878) 3 App Cas 1040, HL.

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113. Frustration.

Where the execution of the works is rendered impossible by the occurrence of an event which was not foreseen at the time of the contract, the contract may be frustrated¹. Frustration occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract². A contractor cannot disregard the contract and claim on a quantum meruit basis merely because, by reason of a shortage of labour, the execution of the works took much longer and was more expensive than anticipated³. Where the contract is for work in or to an existing building, the destruction of that building before the start or during the progress of work may frustrate the contract⁴. On the other hand, it is generally the contractor who takes the risk of the accidental destruction of the works themselves⁵ and in such a case the contractor will not be discharged. Most contracts for building or engineering work entitle the contractor to an extension of time for completion if events occur which might, if prolonged, frustrate the contract. Since it is essential to the operation of the doctrine of frustration that the parties have not made an express provision in respect of the alleged frustrating event⁶, it seems that in those cases the contract will not be frustrated⁷.

Neither the employer nor the contractor can rely on an event which they themselves caused as frustrating the contract⁸.

1 As to frustration generally and as to the effects of frustration on building contracts where the Law Reform (Frustrated Contracts) Act 1943 applies see CONTRACT vol 9(1) (Reissue) para 897 et seq.

2 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729, [1956] 2 All ER 145 at 160, HL, per Lord Radcliffe.

3 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, [1956] 2 All ER 145, HL; disapproving *Bush v Whitehaven Port and Town Trustees* (1888) 52 JP 392, CA; and see *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA.

4 *Wong Lai Ying v Chinachem Investment Co Ltd* (1979) 13 BLR 81, PC (works destroyed by a landslide); *Taylor v Caldwell* (1863) 3 B & S 826; *Appleby v Myers* (1867) LR 2 CP 651; and see *J Lauritzen AS v Wijsmuller BV, The Super Servant Two* [1989] 1 Lloyd's Rep 148; affd [1990] 1 Lloyd's Rep 1, CA.

5 *Appleby v Myers* (1867) LR 2 CP 651; *Brecknock and Abergavenny Canal Navigation Co v Pritchard* (1796) 6 Term Rep 750. It is for this reason that the contractor is required by most contracts to insure the works.

6 *The Eugenia* [1964] 2 QB 226 at 239, [1964] 1 All ER 161 at 166, CA, per Lord Denning MR.

7 Ultimately, however, the question is one of construction and the fact that the contract makes some express provision as to a particular event does not mean that in no circumstances can the contract be frustrated by that event: see *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, HL; and *Bank Line Ltd v Capel* [1919] AC 435 at 456, HL, per Lord Sumner; *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632 at 665, CA, per Asquith LJ; *The Eugenia* [1964] 2 QB 226 at 239, CA, per Lord Denning MR; *Constantine Ltd v Imperial Smelting Ltd* [1942] AC 154, HL.

8 *Mertens v Home Freeholds Co* [1921] 2 KB 526, CA.

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114. Excuses for non-performance not amounting to frustration.

Liability in contract is strict and an unforeseen event short of frustration will not normally excuse a failure to perform a contract. Where the contractor's costs greatly increased because of inflation but the contract did not enable all the increase to be recovered, there was no frustration¹. In the absence of an express provision entitling the contractor to an extension of time, bad weather will not excuse late completion². Again, in the absence of an express provision, a strike causing a failure to complete by a fixed day is immaterial³. But where the contractor's obligation is to complete within a reasonable time, delay caused by a strike is a factor to be considered in determining what is a reasonable date for completion⁴. Where the contract provides that the contractor is not to be liable in the event of force majeure⁵, the events contemplated by the expression 'force majeure' depend upon the construction of the contract⁶.

1 *Wates Ltd v GLC* (1983) 25 BLR 1 at 35, CA, where Stephenson LJ said 'inflation increased not at a trot or a canter, but at a gallop'.

2 *Maryon v Carter* (1830) 4 C & P 295; *Matsoukis v Priestman & Co* [1915] 1 KB 681. As to extensions of time for completion see para 69 ante; *Electric Power Equipment Ltd v RCA Victor Co Ltd* (1963) 41 DLR (2d) 727. However, extreme weather conditions may amount to an act of God which, whilst not ordinarily excusing a breach of contract, may, on a proper construction of the parties' contract, bring the contract to an end: *Baily v de Crespigny* (1869) LR 4 QB 180 at 185 per Hannen J.

3 *Budgett & Co v Binnington & Co* [1891] 1 QB 35, CA.

4 *Hick v Raymond and Reid* [1893] AC 22, HL; see also *H Fairweather & Co Ltd v Wandsworth London Borough Council* (1987) 39 BLR 106 at 118-119 per Judge Fox-Andrews QC.

5 As to force majeure see CONTRACT vol 9(1) (Reissue) para 906; and the definition in *Lebeaupin v R Crispin & Co* [1920] 2 KB 714 at 718 per McCardie J; but note that many of the events there mentioned are the subject of express provisions in most standard form contracts and the term will then have a narrower meaning. See also *Sonat Offshore SA v Amerada Hess Development Ltd* (1987) 39 BLR 1, CA.

6 *Matsoukis v Priestman & Co* [1915] 1 KB 681.

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(iii) Termination

A. POWER TO DETERMINE

115. Right to terminate contract.

In building contracts a clear distinction usually needs to be made between the contractual rights and powers which derive from the occurrence of events which entitle one party to terminate the employment of the contractor under the contract¹ and the common law rights and powers which entitle the party to treat himself as released from his acceptance of a repudiatory breach of contract by the other party. The latter form part of the general law of contract and are not considered in detail here². This part of this title is concerned with the former.

In practice the relevant event may be both a repudiation and one which entitles a party to exercise a contractual right of determination. However, the facts necessary to entitle a party to determine the other party's employment under the contract may not amount to conduct which is repudiatory³. Unless the contract expressly so provides, common law rights and remedies are not to be regarded as excluding the operation of contractual rights and remedies⁴.

Acceptance of a repudiatory breach releases both parties from the further performance of their obligations under the contract and will prevent the exercise thereafter of a contractual right of determination. Similarly the exercise of a contractual right of determination will not be regarded as itself being an acceptance of repudiation⁵.

The innocent party should therefore, if possible, make it clear that one course is being adopted without prejudice to his other rights should the former course be held to be invalid⁶. But if the former course were the contractual right of determination then the innocent party might be treated as having repudiated the contract.

1 Frequently the events would not otherwise justify the discharge of the contract. But a contractual provision may be unenforceable as a penalty: *Ranger v Great Western Rly* (1854) 5 HL Cas 72; *Public Works Comr v Hills* [1906] AC 368, PC; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 698, [1973] 3 All ER 195 at 199, HL, per Lord Reid, at 704, 204 per Lord Morris, and at 711, 210 per Viscount Dilhorne; *Jobson v Johnson* [1989] 1 All ER 621 at 633-634, [1989] 1 WLR 1026 at 1041, CA, per Nicholls J.

2 See generally CONTRACT.

3 *Laing Management Ltd and Morrison-Knudson Ltd v Aegon Insurance Co (UK) Ltd* (1997) 86 BLR 70, (1997) 55 ConLR 1.

4 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *Architectural Installation Services Ltd v James Gibbons (Windows) Ltd* (1989) 46 BLR 91 at 100 per Judge Bowsher QC; *Lockland Builders Ltd v John Kim Rickwood* (1995) 77 BLR 38, (1995) 46 ConLR 92, CA.

5 *ER Dyer Ltd v Simon Build/ER Peter Lind Partnership* (1982) 23 BLR 23 at 33 per Nolan J (but the contract there expressly provided that the exercise of the contractual right would not avoid or release the contractor from any of its obligations or liabilities under the contract, etc); *Mvita Construction Co Ltd v Tanzania Harbours Authority* (1988) 46 BLR 19 at 33, Tanz CA, per Nyalali CJ (dealing with a contract in similar terms).

6 See *Architectural Installation Services Ltd v James Gibbons (Windows) Ltd* (1989) 46 BLR 91 at 100 per Judge Bowsher QC.

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116. Express powers of determination or forfeiture generally.

Building contracts frequently give a party (be it employer, contractor or sub-contractor) power to determine the contract or the contractor's employment or to 'forfeit' the contract on the happening of some event or on some default by the contractor. Such provisions used commonly to be called forfeiture clauses (and the description is still prevalent in engineering and international contracts) but the term more widely used particularly in standard form contracts is 'determination clause'. Determination clauses are inserted for two principal reasons: first, a party (especially the employer) will be able to determine the contractor's employment (but not the contract) in the event of a breach which might not amount to a repudiation¹, and secondly, to secure to the employer more extensive rights than he would have if he accepted a repudiatory breach by the contractor².

The power to determine may be limited by the contract to arise:

- 51 (1) where the contractor is in default in: (a) failing to commence the work³; (b) failing regularly to proceed with the work for a fixed period⁴; (c) failing to proceed to the satisfaction of the employer or the architect⁵; (d) failing to proceed with such dispatch as will in the opinion of the architect enable the works to be completed by the time stipulated⁶; (e) failing to continue with the work⁷; (f) failing to proceed in the manner required by the architect⁸, or not complying with his orders and directions⁹; (g) failing to perform the work as specified¹⁰, or not observing some stipulation of the contract¹¹, or being guilty of any default¹²; (h) not completing as stipulated¹³, or by the time agreed¹⁴, or not completing under the direction and to the satisfaction of the surveyor¹⁵; (i) leaving the works in an unfinished state¹⁶; (j) failing, after proper notice, to rectify defective work¹⁷; (k) removing materials from the site¹⁸; (l) not maintaining the works¹⁹; (m) sub-contracting without prior consent²⁰; (n) failing to proceed regularly and diligently²¹;
- 52 (2) where the employer is in default: (a) by failing to pay the amount certified²²; (b) by withholding²³, interfering with or obstructing the issue of a certificate²⁴; (c) by having the work suspended²⁵; (d) by failing to provide drawings²⁶.

In addition a power to determine is often given if the other party should go bankrupt or go into liquidation²⁷.

1 As to what amounts to a repudiation see para 115 ante.

2 See para 119 et seq post: the rights of the employer over the contractor's plant and materials, in particular, are more extensive than those arising from the acceptance of a repudiatory breach. See also *Re Cosslett (Contractors) Ltd* [1997] 4 All ER 115, sub nom *Cosslett v Mid-Glamorgan County Council* (1997) 85 BLR 1, CA.

3 *Mohan and Homes v Dundalk, Newry and Greenore Rly Co* (1880) 6 LR 477.

4 See *Re Garrud, ex p Newitt* (1881) 16 ChD 522 at 533, CA, per Cotton LJ; *Re Walker, ex p Barter, ex p Black* (1881) 26 ChD 510, CA.

5 See *Davis v Swansea Corpn* (1853) 8 Exch 808; *Stadhard v Lee* (1863) 3 B & S 364.

- 6 See *Brown v Bateman* (1867) LR 2 CP 272 at 275; *Roberts v Bury Improvement Comrs* (1870) LR 5 CP 310; *Arterial Drainage Co Ltd v Rathangan River Drainage Board* (1880) 6 LR Ir 513; *Cork Corpn v Rooney* (1881) 7 LR Ir 191.
- 7 See *Rouch v Great Western Rly Co* (1841) 1 QB 51 at 52.
- 8 See *Walker v London and North Western Rly Co* (1876) 1 CPD 518.
- 9 See *Hunt v South Eastern Rly Co* (1875) 45 LJQB 87 at 88, HL.
- 10 *Mohan and Homes v Dundalk, Newry and Greenore Rly Co* (1880) 6 LR Ir 477.
- 11 See *Stevens v Taylor* (1860) 2 F & F 419.
- 12 See *Garrett v Salisbury and Dorset Junction Rly Co* (1866) LR 2 Eq 358.
- 13 See *Baker v Gray* (1856) 17 CB 462.
- 14 See *Tooth v Hallett* (1869) 4 Ch App 242; *Marsden v Sambell* (1880) 28 WR 952 at 953.
- 15 See *Hunt v Bishop* (1853) 8 Exch 675.
- 16 See *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA.
- 17 See *Arterial Drainage Co v Rathangan River Drainage Board* (1880) 6 LR Ir 513.
- 18 See *Marsden v Sambell* (1880) 28 WR 952.
- 19 See *Walker v London and North Western Rly Co* (1876) 1 CPD 518.
- 20 *Thomas Feather & Co (Bradford) Ltd v Keighley Corpn* (1953) 52 LGR 30.
- 21 *JM Hill & Sons Ltd v Camden London Borough Council* (1980) 18 BLR 31, CA. See also *West Faulkner Associates v Newham London Borough Council* (1994) 71 BLR 1, CA.
- 22 *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 39, CA.
- 23 *Smith v Howden Union Rural Sanitary Authority and Fowler* (1890) 2 Hudson's BC (4th Edn) 156, DC.
- 24 *RB Burden Ltd v Swansea Corpn* [1957] 3 All ER 243 at 253, [1957] 1 WLR 1167 at 1180, HL, per Lord Tucker.
- 25 *John Jarvis Ltd v Rockdale Housing Association Ltd* (1986) 36 BLR 48, CA.
- 26 *Roberts v Bury Improvement Comrs* (1870) LR 5 CP 310.
- 27 See para 124 post.

UPDATE

116 Express powers of determination or forfeiture generally

NOTE 22--See also *Reinwood Ltd v L Brown & Sons Ltd (No 2)* [2008] EWCA Civ 1090, (2008) 121 ConLR 1 (failure to pay value added tax according to contractor's provisional assessment).

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117. Means of ascertaining whether the power to determine has arisen.

In general the contract will specify the means of ascertaining the event giving rise to a power to determine the contractor's employment. Modern standard form contracts generally give to the architect or the engineer power to decide when the employer may be able to determine the contract or the employment of the contractor¹. Where the decisions of the architect are not subject to review², then the contractor can only impugn such a decision on the grounds that the architect has not exercised an independent judgment³ on the issue or is in some way disqualified from making the decision⁴. But in the absence of such provision, the occurrence of the event will be determined by adjudication, arbitration⁵ or by litigation⁶. Where the contract provides that the employer himself is to decide whether the contractual power to determine the contractor's employment has arisen, the employer must act reasonably, but the terms of the contract may make it clear that the decision of the employer is to be final⁷.

1 As to standard forms of contract see para 2 ante.

2 Cf *Loke Hong Kee Pte Ltd v United Overseas Land Ltd* (1982) 23 BLR 35, PC.

3 See *Scott v Liverpool Corpn* (1858) 3 De G & J 334; *Pawley v Turnbull* (1861) 3 Giff 70; *Hickman & Co v Roberts* [1913] AC 229, HL.

4 See paras 136-138 post.

5 *Garrett v Salisbury and Dorset Junction Rly Co* (1866) LR 2 Eq 358. See also *Central Provident Fund Board v Ho Bock Kee* (1981) 17 BLR 21, Sing CA.

6 *Northampton Gas Light Co v Parnell* (1855) 15 CB 630 at 648-649 per Jervis CJ; *Roberts v Bury Improvement Comrs* (1870) LR 5 CP 310 at 326-327 per Kelly CB.

7 See *Stadhard v Lee* (1863) 32 LJQB 75 at 78 per Cockburn CJ; and *Central Provident Fund Board v Ho Bock Kee* (1981) 17 BLR 21, Sing CA. An employer is obliged to act honestly, fairly and reasonably in all its judgments, decisions and certificates: *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 BLR 42, (1996) 49 ConLR 1, CA. Whilst the decision in *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* supra was overruled by the House of Lords in *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd* [1999] 1 AC 266, (1998) 88 BLR 1, the principle stated remains unaffected.

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118. Exercise of a power to determine.

The contract will usually state how a power to determine the contract, or to determine the contractor's employment under it, is to be exercised. In the absence of any such requirement, no formality is necessary provided there is some act which is sufficient to inform the other party that the power has been exercised¹, for such a power must be exercised in an unequivocal and unambiguous manner². The contract may provide that the power arises on a failure by the contractor to comply with a notice previously served on him. If the employer or the architect required the contractor to do some particular act, then the first notice should specify that act³, but if such a first or warning notice complains of general neglect in the execution of the work, the notice is not bad in form by reason of its failure to specify every default⁴.

A clause giving the employer power to determine the contract for dilatory progress may remain exercisable after the stipulated date for completion has passed⁵, but where the power to determine for dilatory progress, on the proper construction of the contract, is related to the progress required to complete on the stipulated date, such power must be exercised before the stipulated date has passed⁶. An ordinary commercial businessman should, however, be able to see that there is a sensible connection between the two notices both in content and time⁷. Where a contractor's right to determine must not be exercised 'unreasonably or vexatiously' the test to be applied is that of a reasonable contractor in the circumstances of the case⁸. Where the contract does not provide for the time between the two notices the second should be given within a reasonable time⁹. Formal defects may not vitiate a notice if there is no prejudice¹⁰.

1 *Drew & Co v Josolyne* (1887) 18 QBD 590 at 597, CA, per Bowen LJ; *JM Hill & Sons Ltd v Camden London Borough Council* (1980) 18 BLR 31 at 43, CA, per Lawton LJ, and at 46-47 per Ormrod LJ.

2 *Roberts v Davey* (1833) 4 B & Ad 664. In *Marsden v Sambell* (1880) 43 LT 120 it was held that the sending of an agent to 'keep an eye' on the contractor and to prevent him from removing materials contrary to the contract was not enough to amount to an election to determine.

3 *Pauling v Dover Corpn* (1855) 10 Exch 753.

4 *Pauling v Dover Corpn* (1855) 10 Exch 753.

5 *Joshua Henshaw & Son v Rochdale Corpn* [1944] KB 381, [1944] 1 All ER 413, CA.

6 *Walker v London and North Western Rly Co* (1876) 1 CPD 518.

7 *Architectural Installation Services Ltd v James Gibbons (Windows) Ltd* (1989) 46 BLR 91 at 98 per Judge Bowsher QC.

8 *John Jarvis Ltd v Rockdale Housing Association* (1986) 36 BLR 48 at 68, CA, per Bingham LJ (a notice is unreasonable only if no reasonable contractor would have issued a notice of determination in the circumstances).

9 See *Mvita Construction Co Ltd v Tanzania Harbours Authority* (1988) 46 BLR 19, Tanz CA.

10 *Goodwin & Son v Fawcett* (1965) 175 Estates Gazette 27; *JM Hill & Sons Ltd v Camden London Borough Council* (1980) 18 BLR 31 at 47, CA, per Ormrod LJ; but cf *Central Provident Fund Board v Ho Bock Kee* (1981) 17 BLR 21, Sing CA; *Eriksson v Whalley* [1971] 1 NSWLR 397, NSW SC.

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B. EFFECTS OF TERMINATION

119. Effects of the exercise of an express power to determine.

The principal effect of the exercise of a power to determine is that the rights of a party in default are suspended (for example until the works have been completed by the employer) and superseded by a new contractual code. Thus the contractor may have no further rights to payment until the employer has completed the work left outstanding¹ and may have to permit his materials, plant and equipment to be used by the employer for the purposes of completing the works². An employer in default may have to pay the contractor whatever is due and to compensate him for the losses caused by the determination.

Where there is a dispute about the validity of determination and the dispute is to be decided by an arbitrator, the court will treat the notice of termination as provisionally valid³. An injunction will not normally be granted to restrain a forfeiture as this would be tantamount to ordering specific performance⁴.

1 See eg *Davies v Swansea Corpn* (1853) 8 Exch 808.

2 See para 122 post.

3 *A-G of Hong Kong v Ko Hon Mau* (1988) 44 BLR 144, HK CA; *Tara Civil Engineering Ltd v Moorfield Developments Ltd* (1989) 46 BLR 72. As to arbitration see para 199 et seq post.

4 *Munro v Wivenhoe and Brightlingsea Rly Co* (1865) 12 LT 655; but cf *Foster and Dicksee v Hastings Corpn* (1903) 87 LT 736. See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, HL; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 2 All ER 321, [1984] 1 WLR 776, HL; *BICC plc v Burndy Corp* [1985] Ch 232, [1985] 1 All ER 417, CA; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL; *Transag Haulage Ltd v Leyland DAF Finance plc* [1994] BCC 356, [1994] 2 BCLC 88. See generally SPECIFIC PERFORMANCE.

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120. Revocation of contractor's licence to occupy site.

Usually the contractor's licence to occupy the site is revoked either expressly or by necessary implication¹, since it is of course granted only to enable the works under the contract to be carried out. If an employer purports to revoke the licence by wrongly relying on a power to determine the contract, the licence subsists and may be protected by the courts against the employer's wish to re-enter to complete the works².

1 *Joshua Henshaw & Sons v Rochdale Corpn* [1944] KB 381, [1944] 1 All ER 413, CA.

2 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 2 All ER 326; cf *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309; *Graham H Roberts Pty Ltd v Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93, NSW Equity Div. See para 102 note 7 ante; and see further CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

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121. Where the property in materials and plant remains in the contractor.

In relation to a determination otherwise than for insolvency¹, and where the employer is given no rights over the contractor's materials, the contractor has a reasonable time in which to remove them and his plant from the site². The employer may have the right to seize and use materials and plant. In such a case, the property in materials will vest in the owner of land if and when the materials are incorporated in the permanent work³, but the property in plant will not pass⁴. It is a breach of contract giving rise to a claim for damages for the contractor after determination to remove materials which the employer is entitled to use⁵.

A provision vesting the contractor's property absolutely in the employer may be unenforceable as being a penalty⁶. Generally such a provision will be intended to operate by way of security for the completion of the works and will not be construed as a penalty⁷.

1 This paragraph and para 122 post assume that neither party is insolvent. For the position where there is insolvency see para 124 post.

2 Where a licence is revoked, the licensee will have a right analogous to that stated in the text: *Mellor v Watkins* (1874) LR 9 QB 400.

3 See para 81 et seq ante.

4 *Re Winter, ex p Bolland* (1878) 8 ChD 225.

5 *Hawthorn v Newcastle-upon-Tyne and North Shields Rly Co* (1840) 3 QB 734n; *Re Winter, ex p Bolland* (1878) 8 ChD 225. See also *Poulton v Wilson* (1858) 1 F & F 403.

6 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Marshall v MacIntosh* (1898) 78 LT 750.

7 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72 at 108-109 per Lord Cranworth.

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122. Position of the employer completing after termination.

Unless the contract otherwise provides, an employer who completes the work with the use of the contractor's materials and plant must account for them to the contractor¹. The duty of the employer is, however, less strict than that imposed on a mortgagee in possession². The contract may provide for the costs to the employer in completing the work to be set off against the sum that would have been payable to the contractor and for the balance to be payable by one party to the other as the case may be. The employer is not entitled to vary the work, as shown in the specification or on the drawings, at the expense of the contractor³, but the employer ought, in principle, to be entitled to a full allowance for any extra costs caused by the delay and disruption consequent upon the contractor's default⁴.

1 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72. The contract may require the contractor to assign the benefit of any sub-contract to the employer. Since the employer cannot require a sub-contractor to complete his work, a right to require an assignment from the contractor is of value; in the absence of such a power, the employer would have to negotiate fresh terms with specialist sub-contractors. However, many sub-contracts render this right nugatory as they provide that the sub-contractor's employment will automatically determine upon the termination, forfeiture or repudiation of the contract or the contractor's employment under it.

2 *Fulton v Dornwell* (1885) 4 NZLR 207, NZ SC. As to mortgagees in possession see MORTGAGE vol 77 (2010) PARA 219.

3 *Dillon v Jack* (1903) 23 NZLR 547 at 549 per Stout CJ.

4 *Dunkirk Colliery Co v Lever* (1878) 9 ChD 20 at 25, CA, per James LJ.

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123. Remedies for wrongful termination.

A wrongful termination does not ipso facto amount to a repudiation of the contract¹. But if, after a wrongful termination, the employer ousts the contractor from the site or otherwise shows an intention not to be bound by the contract, the contractor may, in such a case, claim the value of the work done and claim, in addition, damages, the measure of which is normally the loss of profit on the incomplete balance². The value of the work done will be assessed on the basis of any instalment payments which have become due under the contract³ together with payment at contractual rates or prices for work executed but not included in the instalments⁴. In the absence of contractual provisions for calculating the value of the work done a reasonable sum will be assessed and payable as a contractual entitlement. The employer will be entitled to an abatement of the sum otherwise due if the work done is defective⁵. There is conflicting authority as to whether instead of pursuing a claim on the basis outlined above a contractor can simply claim a reasonable sum for work and labour on a quantum meruit⁶. However, it is more likely that there is no such option open to the contractor⁷.

1 Sub-contracts commonly provide, however, that they shall determine if the contractor's employment under the main contract is determined for any reason. In such cases a right to assignment of the benefit of further performance of the sub-contract if reserved in the main contract is of no value. See also *ER Dyer Ltd v Simon Build/Peter Lind Partnership* (1982) 23 BLR 23, in which it was held that a contractual determination under a main contract was not the determination provided by the sub-contract (which was read as referring to a repudiation of the main contract).

2 See generally DAMAGES.

3 These remain payable: see *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056, [1989] 1 All ER 545, HL.

4 *Felton v Wharrin* (1906) 2 Hudson's BC (4th Edn) 398, CA.

5 *Slater v CA Duquemin Ltd* (1992) 29 ConLR 24.

6 As to quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) paras 7, 113 et seq.

7 *Ranger v Great Western Railway Co* (1854) 5 HL Cas 72, HL; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056 at 1098, [1989] 1 All ER 545 at 549, HL, per Lord Brandon of Oakbrook. Cases to the contrary include: *Planché v Colburn* (1831) 5 C & P 58; *Prickett v Badger* (1856) 1 CBNS 296; *Appleby v Myers* (1867) LR 2 CP 651; *Luxor (Eastbourne) v Cooper* [1941] AC 108, [1941] 1 All ER 33; *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA.

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(iv) Insolvency

124. Insolvency.

The insolvency of individual¹ or corporate² employers, contractors or professionals involved in a construction project is governed by the Insolvency Act 1986. Determination³ or forfeiture, vesting⁴ and direct payment clauses⁵ in building contracts give rise to particular insolvency considerations.

Most building contracts purport to give the employer, or in the case of a main contract, the sub-contractor, certain rights to determine the employment of the contractor or to determine (or formerly to forfeit) the contract in the event of the insolvency of the main contractor⁶. These provisions are enforceable against the trustee in bankruptcy or liquidator if the contract is a personal contract⁷ and since the licence given to the contractor to enter upon the site is not included in the definition of property given in the Insolvency Act 1986⁸.

A provision providing for the forfeiture of any property of the contractor is void against the trustee in bankruptcy or the liquidator⁹. However, if the property has already vested in the employer or if the employer has a lien upon it, a provision allowing the employer to seize it is valid¹⁰. The same is true of a provision that creates an equitable charge over, or an assignment of, the plant or materials¹¹. Such clauses do not create interests registrable as a bill of sale¹². A provision providing for the forfeiture of any property of the contractor is also valid if it is stated to operate in the event of some cause other than insolvency, such as delay, albeit that that event has been caused by insolvency¹³.

Most building contracts also purport to allow an employer to make direct payments to sub-contractors in the event of non-payment by the contractor. The operation of such clauses after the insolvency of the contractor has been held to be valid¹⁴ but these decisions are of doubtful validity since they infringe the *pari passu* rule¹⁵.

An employer can recover set-off money¹⁶ owed to the contractor under the immediate or other contracts¹⁷, by virtue of the mutual dealings provisions¹⁸. The right applies to retention money but not so as to defeat the claim of a secured creditor¹⁹.

1 As to individual insolvency see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

2 As to corporate insolvency see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 1 et seq.

3 See para 115 et seq ante.

4 See the text and notes 5-11 infra.

5 See the text and notes 12-18 infra.

6 The same principles apply, *mutatis mutandis*, as between the main contractor and sub-contractors.

7 *Re Walker, ex p Gould* (1884) 13 QBD 454. See also, for the comparable position of the architect, para 280 post.

8 See the Insolvency Act 1986 s 436; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 400.

- 9 See *ibid* ss 127, 284 (relating to bankruptcy and liquidation respectively); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 217; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 700. See *Re Harrison, ex p Jay* (1850) 14 ChD 19, CA; *Re Walker, ex p Barter, ex p Black* (1884) 26 ChD 510, CA.
- 10 *Crowfoot v London Dock Co* (1834) 2 Cr & M 637; *Hawthorn v Newcastle-upon-Tyne and North Shields Rly Co* (1840) 3 QB 734n; *Brown v Bateman* (1867) LR 2 CP 272; *Re Waugh, ex p Dickin* (1876) 4 ChD 524; *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA; *Re Walker, ex p Barter, ex p Black* (1884) 26 ChD 510, CA; *Byford v Russell* [1907] 2 KB 522.
- 11 *Re Waugh, ex p Dickin* (1876) 4 ChD 524; *Re Garrud, ex p Newitt* (1881) 16 ChD 522.
- 12 *Brown v Bateman* (1807) LR 2 CP 272; *Blake v Izard* (1867) 16 WR 108; *Re Garrud, ex p Newitt* (1881) 16 ChD 522; *Reeves v Barlow* (1884) 12 QBD 436, CA. But see *Re Cosslett (Contractors) Ltd* [1997] 4 All ER 115, sub nom *Cosslett v Mid-Glamorgan County Council* (1997) 85 BLR 1, CA.
- 13 *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690.
- 14 *Re Holt, ex p Gray* (1888) 58 LJB 5; *Re Wilkinson, ex p Fowler* [1905] 2 KB 713; *Re Tout and Finch Ltd* [1954] 1 All ER 127.
- 15 See *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL. The cases referred to in note 14 supra were not cited in this case, but they were not followed in *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in liquidation)* 1969 (1) SA 660, SA SC (App Div) (but note the different provisions of South African law)); *A-G v McMillan & Lockwood Ltd* [1991] 1 NZLR 53, NZ CA; *Joo Yee Construction (Pte) Ltd v Diethelm Industries (Pte) Ltd* [1990] 2 MLJ 66; *Re Right Time Construction Co Ltd* [1990] 2 HKLR 223, 52 BLR 117, HK CA; and *B Mullan & Sons Contractors Ltd v John Ross and Malcolm London* (1996) 86 BLR 1, NI CA (a direct payment provision offended against the *pari passu* principle). This decision is likely to be followed in England and Wales. See contra *Re CG Monkhouse Properties Ltd* (1968) 69 SRNSW 429; *Gericeuich Contracting Pty Ltd v Sabemo (WA) Pty Ltd* [1984] 9 ACLR 452.
- 16 This includes damages: *Peat v Jones & Co* (1881) 8 QBD 147, CA.
- 17 *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 ChD 216, CA.
- 18 See the Insolvency Act 1986 ss 323, 411; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 547. For the operation of those provisions see *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL; and for building contracts see *Willment Bros Ltd v North West Thames Regional Health Authority* (1984) 26 BLR 51, CA; *Farley v Housing and Commercial Developments Ltd* (1984) 26 BLR 66.
- 19 *MacJordan Construction v Brookmount Erostin* (1991) 56 BLR 1, CA. An employer cannot use retention money due to the sub-contractor by way of set-off on the insolvency of the contractor: *PC Harrington Contractors Ltd v Co-partnership Development Ltd* (1998) 88 BLR 44, CA. As to retention money see further para 149 post.

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3. CERTIFICATION AND REMUNERATION

(1) CERTIFICATION

(i) In general

125. Classes of certificate.

In contracts for works of construction, it is common for the parties to confer on an architect, engineer or some other third party a power to issue certificates. The principal purpose of a certificate is to secure payment to the contractor of sums properly due to him under the contract or to express approval of work that has been done. The function of an interim certificate is to provide for payment generally on account to the contractor and the function of a final certificate will normally be to state the final balance due or to express the architect's satisfaction with the completed works¹ or both. Modern contracts often require a number of certificates to be given. Thus the architect or engineer may be required to certify the date on which the works were practically complete², because on practical completion the employer will cease to be entitled to liquidated damages³ for delay and in some contracts the contractor will be entitled to the release of part of the retention money⁴. Further, the architect or engineer may be required to give a certificate when the contractor has finished making defects good and the works are finally complete, for again the final release of retention money may be conditional on such a certificate⁵.

1 For the construction of a contract empowering the certifier to give certificates that the work has been satisfactorily carried out see *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Co)* [1947] AC 428, HL; *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 40 ConLR 36, CA. As to interim certificates see paras 130-132 post; and as to final certificates see paras 133-134 post.

2 As to practical completion see para 67 ante.

3 See para 69 et seq ante.

4 As to retention money see para 149 post.

5 As to the effect of making a certificate a condition precedent to payment see para 129 post.

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126. Form of certificate.

Generally each contract will provide for the form of certificates required under it but, subject to an express provision to the contrary, a certificate need not be in writing¹. Whether the document or statement relied on constitutes a certificate for the purposes of the contract is a question of construction². In practice, certificates in modern building and engineering contracts are invariably required to be in writing.

If the contract requires only that the architect should certify his satisfaction with the works, it is not necessary that the certificate should state a balance due and, if an amount is stated, neither party is bound by it³. Similarly, a statement by the certifier approving the contractor's account may be taken as an expression of satisfaction⁴.

1 *Coker v Young* (1860) 2 F & F 98 at 101 per Hill J; *Roberts v Watkins* (1863) 14 CBNS 592; *Elmes v Burgh Market Co* (1891) 2 Hudson's BC (4th Edn) 170. A direction in the contract that the certificate should be 'delivered' does not imply that the certificate should be in writing: *Oates v Bromell* (1704) 1 Salk 75.

2 *Coleman v Gittins* (1884) 1 TLR 8; *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963; and see *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 50, CA. Whether a document constitutes a certificate may be decided by reference to the surrounding circumstances: see *Merton London Borough Council v Lowe* (1981) 18 BLR 130, CA, where it was held that the document was a certificate after reference to the accompanying letter which stated that it was enclosing the final certificate. Minor errors will not invalidate a certificate if no one is misled: *Emson Contractors Ltd v Protea Estates Ltd* (1987) 39 BLR 126, (1987) 13 ConLR 41.

3 *Pashby v Birmingham Corp* (1856) 18 CB 2.

4 *Harman v Scott* (1874) 2 CA 407, NZ CA; *Clarke v Murray* (1885) 11 VLR 817, Vic CA; but cf *Morgan v Birnie* (1833) 9 Bing 672. See also *Goodman v Layborn* (1881) Roscoe's BC (4th Edn) 162.

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127. Status of a certificate.

A certificate is not akin to the award of an arbitrator¹. Thus it is unnecessary that an agreement to be bound by certificates should be in writing². Even a stipulation that the certifier is to act as 'exclusive judge' does not make a certificate an award³. A certificate is binding only between the parties; accordingly, as between the employer or contractor and a stranger to the contract, whether the contract works are complete is a question of fact and will not depend on the issue of a certificate⁴. The employer may claim damages for negligent supervision from the architect notwithstanding a certificate expressing satisfaction with the works⁵.

1 *Northampton Gas Light Co v Parnell* (1855) 15 CB 630.

2 *Northampton Gas Light Co v Parnell* (1855) 15 CB 630 at 646-648 per Jervis CJ. See also *Reed v Van der Vorm* (1985) 35 BLR 136.

3 *Northampton Gas Light Co v Parnell* (1855) 15 CB 630; *Kennedy Ltd v Barrow-in-Furness Corpn* (1909) 2 Hudson's BC (4th Edn) 411, CA.

4 *Lewis v Hoare* (1881) 44 LT 66, HL.

5 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL.

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128. Position of certifier.

An architect or engineer exercising jurisdiction to certify under a contract must act impartially and independently¹. In addition he will owe a duty to the employer to carry out the certification procedure with reasonable care and skill and will be liable to him for any loss caused by his negligence². However, he is unlikely to be liable for loss caused to the contractor³.

Once the jurisdiction has been conferred on the certifier, in the absence of an express provision in the contract, it cannot be revoked⁴, but if a second architect is properly appointed to succeed the original architect, the successor will become the certifier⁵.

The certifier must exercise his jurisdiction in accordance with the terms of the contract⁶. Thus where the contract calls for the certificate of two architects, the certificate of one of them is not sufficient⁷.

1 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; cf *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann.

2 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL (overruling *Chambers v Goldthorpe* [1901] 1 KB 624, CA, where it was held that the certifier was acting in a judicial or quasi-judicial role and could not be liable for loss caused by negligent certification). The architect may be able to claim immunity by agreement: *Sutcliffe v Thackrah* supra; and see paras 252, 254 post. For the position of arbitrators see paras 202-204 post.

3 *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, (1988) 44 BLR 33, CA, where the court found that taking into account all the circumstances including the terms of the building contract and the relationship between the parties, the engineers were not under a duty to prevent the contractor suffering economic loss. The situation may possibly be different if the building contract does not contain an arbitration clause: see *Pacific Associates Inc v Baxter* supra at 1024, 180-181, 68-69 per Purchas LJ, at 1028-1029, 184, 74-75 per Ralph Gibson LJ, and at 1037, 190, 83 per Russell LJ. See also *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 66 BLR 56, Can SC, where it was held that an engineer might in principle be liable to a contractor for negligent misrepresentation in relation to errors in tender drawings.

4 *Mills v Bayley* (1863) 2 H & C 36. See also *Murray v Cohen* (1888) 9 NSW Eq 124.

5 *Kellett v Stockport Corpn* (1906) 70 JP 154; cf *Wangler v Swift* 90 NY 38 (NY CA, 1882).

6 See para 141 post.

7 *Lamprell v Billericay Union* (1849) 18 LJEx 282.

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129. Whether a certificate is a condition precedent.

All types of certificate may be expressly made a condition precedent to payment. Where a certificate is a condition precedent¹, even though the works are complete the contractor cannot recover the contract price in the absence of a certificate², unless the certifier is disqualified³, or the case is one in which the need for a certificate can be dispensed with⁴. Whether a certificate is a condition precedent to payment is a question of construction⁵. Where the architect or engineer exercises skill and judgment in making the certificate, the courts have leaned towards the view that a certificate is a condition precedent to the contractor's entitlement to payment⁶. The contractor may, however, have an immediate right to adjudication⁷, arbitration⁸ or litigation⁹ to seek to obtain or alter a certificate. He may also be entitled to suspend performance for non-payment¹⁰.

1 Such a condition will not necessarily be imported into a new contract substituted for one (containing such a stipulation) which has been abandoned: *Hunt v South Eastern Rly Co* (1875) 45 LJQB 87, HL.

2 *Lewis v Hoare* (1881) 44 LT 66, HL; *Eaglesham v McMaster* [1920] 2 KB 169.

3 See paras 136-138 post.

4 See paras 139-141 post. However, the contract may allow the contractor to refer the matter to arbitration for the grant of a certificate or to alter the contents of an existing one: *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 39, CA.

5 For a useful illustration see *Crestar Ltd v Carr* (1987) 37 BLR 113, CA. See also *Costain Building & Engineering Ltd v Scottish Rugby Union plc* (1993) 69 BLR 80, Ct of Sess.

6 *Glenn v Leith* (1853) 1 CLR 569; *Grafton v Eastern Counties Rly Co* (1853) 8 Exch 699; *Westwood v Secretary of State for India in Council* (1863) 7 LT 736; *Dunaberg and Witepsk Rly Co Ltd v Hopkins, Gilkes & Co Ltd* (1877) 36 LT 733; *Wallace v Brandon and Byshottles UDC* (1903) 2 Hudson's BC (4th Edn) 362, CA. See also *Howden & Co v Powell Duffryn Steam Coal Co* 1912 SC 920.

7 See the Housing Grants, Construction and Regeneration Act 1996 s 108; and para 207 post.

8 See paras 142, 199-205 post.

9 See paras 142-143, 194-198 post.

10 See the Housing Grants, Construction and Regeneration Act 1996 s 112; and para 158 post.

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130. Interim certificates.

The purpose of interim certificates is to provide for payments on account, for example by reference to the value of the works or by stage payments of fixed or variable sums¹. Most contracts expressly provide that sums paid on interim certificates will be subject to adjustment on the issuing of the final certificate but interim payments have always been regarded as subject to such adjustment². An interim certificate will not be taken as an approval of the work³. In general, an interim certificate creates a debt in favour of the contractor which the employer must pay at once⁴ subject to any right to set-off. Moreover, the employer may not withhold payment under a construction contract unless he has given an effective withholding notice⁵. Where, however, in contracts other than construction contracts, the contract provides that payment shall not legally be due until completion but that advances may be made against certificates, the contractor has no right of action before completion⁶.

Where the contract provides that no reference of any dispute to arbitration may be made until the completion of the works, the amount certified by way of interim certificate cannot be challenged by arbitration before completion. Often a dispute as to withholding an interim certificate is excepted from such a provision so that such a dispute can be submitted to arbitration at once, but a dispute relating to the valuation of work included in an interim certificate does not amount to a dispute over the withholding of an interim certificate⁷.

However, the contractor under a construction contract generally has an immediate remedy for under-valuation by adjudication, which remedy he may pursue at any time⁸.

1 A party to a construction contract is, subject to limited exceptions, entitled to payment by instalments, stage payments or other periodic payments: see the Housing Grants, Construction and Regeneration Act 1996 s 109; and para 155 post. For the meaning of 'construction contract' for the purposes of the Housing Grants, Construction and Regeneration Act 1996 see para 9 ante. As to construction contracts see paras 9-10 ante, 155-159, 206 et seq post.

2 *Lamprell v Billericay Union* (1849) 3 Exch 283 at 305 per Rolfe B; *Tharsis Sulphur and Copper Co v M'Elroy & Sons* (1878) 3 App Cas 1040 at 1048-1049, HL, per Lord Hatherley LC.

3 *Tripp v Armitage* (1839) 4 M & W 687; *Cooper v Uttoxeter Burial Board* (1864) 11 LT 565; *Richardson v Mahon* (1879) 4 LR Ir 486; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann.

4 *Pickering v Ilfracombe Rly Co* (1868) LR 3 CP 235. See also para 132 post.

5 See the Housing Grants, Construction and Regeneration Act 1996 s 111; and para 157 post.

6 *Tharsis Sulphur and Copper Co v M'Elroy & Sons* (1878) 3 App Cas 1040 at 1048-1049, HL.

7 *AE Farr Ltd v Ministry of Transport* [1960] 3 All ER 88, [1960] 1 WLR 956.

8 See the Housing Grants, Construction and Regeneration Act 1996 s 108; and para 207 post. See also *Herschel Engineering Ltd v Breen Property Ltd* [2000] BLR 272, [2000] TCLR 473; and para 207 post.

UPDATE

130 Interim certificates

NOTES--See *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, [2005] 3 All ER 932.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(1) CERTIFICATION/(i) In general/131. Ascertaining the amount of an interim certificate.

131. Ascertaining the amount of an interim certificate.

It depends upon the terms of the contract whether the certifier is to take into account not only the value of work done but also the value of the contractor's materials and plant¹. The certifier may be required, or be given discretion, to include the value of materials intended for incorporation in the works not yet brought onto the site. Where the architect or engineer is required to value work done, it is submitted that 'value' means the proportion that the work done bears to the value of the contract as a whole; the cost to the contractor is irrelevant². The architect may have power to include in an interim certificate an amount in respect of work carried out by a nominated sub-contractor³.

1 See eg *Pickering v Ilfracombe Rly Co* (1868) LR 3 CP 235; and see *Tripp v Armitage* (1839) 4 M & W 687.

2 See *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592, HL.

3 As to the nomination of sub-contractors see para 41 ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(1) CERTIFICATION/(i) In general/132. Payment of interim certificate.

132. Payment of interim certificate.

The express or implied terms of the contract will determine the time when the employer is to make payment on an interim certificate. If a construction contract¹ fails to make adequate express provision as to the time for payment, the relevant provisions of the scheme for construction contracts apply². In most cases, an unliquidated cross-claim for defective work or delay arising out of the performance of the contract will provide an employer with a defence by way of set-off to a claim by a contractor³. However, if a contract clearly and unequivocally purports to exclude or restrict the right of set-off the courts will give effect to such a provision⁴. In such a case the employer can only deduct sums permitted by the contract. It is now established, however, that the employer can raise unliquidated damages for delay or defective work as a defence to a claim brought on interim certificates by way of set-off⁵ or abatement⁶. However, under a construction contract the employer's defence of set-off or abatement is subject to the service of an effective notice of intention to withhold payment⁷.

¹ I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

² See *ibid* s 110(3); and para 156 post. As to payment provisions under the scheme for construction contracts see para 160 post.

³ *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA. See also para 182 post; and see generally CIVIL PROCEDURE vol 11 (2009) para 634 et seq.

⁴ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL.

⁵ *Frederick Mark Ltd v Schild* [1972] 1 Lloyd's Rep 9, CA; *GKN Foundations Ltd v Wandsworth London Borough Council* [1972] 1 Lloyd's Rep 528, CA; and *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL (overruling *Dawnays Ltd v FG Minter Ltd* [1971] 2 All ER 1389, [1971] 1 WLR 1205, CA). As to set-off see further para 182 post.

⁶ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *Acsim (Southern) v Dancon Danish Contracting and Development Co Ltd* (1989) 47 BLR 55, CA. See para 182 post.

⁷ See the Housing Grants, Construction and Regeneration Act 1996 s 111 (see para 157 post); and *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158; *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187, 70 ConLR 51.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(1) CERTIFICATION/(i) In general/133. Function of final certificates.

133. Function of final certificates.

The effect of a final certificate will depend on the terms of the contract¹. The contract may provide that the final certificate must: (1) state the amount finally due to the parties; (2) express the architect's satisfaction with the works; (3) release to the contractor the retention money²; or (4) contain any combination of these provisions. Thus where the architect has no power to certify the final balance due, a statement of the final balance due in a final certificate will not bind the parties³ and in such a case the final balance must be ascertained by litigation⁴ arbitration⁵ or adjudication⁶. An architect or engineer will be functus officio after the issue of the final certificate⁷, unless he has other functions to perform⁸ under the contract.

1 See the cases cited in para 126 note 2 ante.

2 As to retention money see para 149 post.

3 *Pashby v Birmingham Corpn* (1856) 18 CB 2.

4 See paras 194-198 post.

5 See paras 199-205 post.

6 See paras 206-219 post.

7 See *H Fairweather Ltd v Asden Securities Ltd* (1979) 12 BLR 40.

8 Such as resolving disputes in civil engineering contracts.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(1) CERTIFICATION/(i) In general/134. Effect of a final certificate.

134. Effect of a final certificate.

Except where the architect is disqualified from certifying¹ or where the certificate may otherwise be dispensed with², the final certificate will be binding and, depending on the terms of the contract, may also be conclusive, otherwise than where there is fraud. Thus, where a final certificate states an amount as due to the contractor which includes sums in respect of additional work which is not ordered in writing, the employer cannot resist payment in respect of the additional work³.

The binding effect of a final certificate may, subject to the express terms of the contract, be open to review by the court, adjudicator or arbitrator in proceedings⁴. Whether (and, if so, upon what matters) a final certificate is conclusive is a question of the construction of the particular terms of the contract⁵. The contract may provide that the final certificate will not become conclusive until the expiration of a specified period from issue. It may also provide that the certificate may be prevented from becoming conclusive by either side taking prescribed steps⁶.

Even where the arbitrator or court has the power to review certificates in general, the final certificate may be expressly rendered conclusive in some respects. Where a contractor has agreed to take proceedings in the courts, he is not estopped or precluded from relying on the conclusive effect of the final certificate issued on a date subsequent to the start of the proceedings. But a final certificate may be conclusive that the works have been properly completed only when the matter is judged at the date of the certificate⁷.

Where the certificate has been given within the jurisdiction conferred on the architect or engineer, and in the absence of fraud or collusion, it cannot be attacked on the grounds that the certifier was mistaken or that the certificate is unreasonable⁸. If the certificate is based on erroneous reports by an agent of the employer, and not on the fraud of the contractor, it is conclusive against the employer⁹.

1 See paras 136-138 post.

2 See para 139 et seq post.

3 *Goodyear v Weymouth and Melcombe Regis Corpn* (1865) 35 LJCP 12; *Connor v Belfast Water Comrs* (1871) IR 5 CL 55; *Laidlaw v Hastings Pier Co* (1874) 2 Hudson's BC (4th Edn) 13.

4 See paras 142-143 post.

5 *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406, sub nom *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619, HL; *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146, HL; *Crestar Ltd v Carr* (1987) 37 BLR 113, (1987) 131 Sol Jo 1154, CA; *Colbart Ltd v Kumar* (1992) 59 BLR 89; *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 40 ConLR 36, CA; *Matthew Hall Ortech Ltd v Tarmac Roadstone Ltd* (1997) 87 BLR 96.

6 Contracts often contain provisions which enable either party to avoid the conclusive effect of the final certificate by commencing arbitration proceedings within a specified period. However, if proceedings are not brought within this period, the court will not grant an extension of time so as to relieve the conclusive effect of the certificate: *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 40 ConLR 36, CA; overruling *McLaughlin & Harvey plc v P & O Developments Ltd* (1991) 55 BLR 101. As to the power of the court to extend the time for beginning arbitral proceedings see the Arbitration Act 1996 s 12; and ARBITRATION vol 2 (2008) PARA 1221.

7 *P & M Kaye Ltd v Hosier and Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146, HL; *HW Nevill (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78.

8 *Goodyear v Weymouth and Melcombe Regis Corp*n (1865) 35 LJCP 12; *Harvey v Lawrence* (1867) 15 LT 571; *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597; *Laidlaw v Hastings Pier Co* (1874) 2 Hudson's BC (4th Edn) 13; *Lord Bateman v Thompson* (1875) 2 Hudson's BC (4th Edn) 36, CA; *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 39; *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA; *Dixons Group plc v Murray-Oboynski* (1997) 86 BLR 16.

9 *Ayr Road Trustees v Adams* (1883) 11 R 326, Ct of Sess. Similarly, an incorrect report from an agent of the certifier will not invalidate the certificate: *Clemence v Clarke* (1879) 2 Hudson's BC (4th Edn) 54, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(1) CERTIFICATION/(ii) Recovery without or in disregard of Certificates/135. Ultra vires certificates.

(ii) Recovery without or in disregard of Certificates

135. Ultra vires certificates.

The certificates of architects and engineers are only conclusive as to matters entrusted to them, and if the certificate is ultra vires as to any matter it is to that extent not conclusive¹. Thus, it may be conclusive as to quantity and not as to liability, or vice versa².

Again, if there is no power in the contract to vary the work to be done, a valid certificate cannot be given for work done at variance with the contract, even though the variation was made on the instructions of the architect, and is of equivalent value to that which should have been done³.

If the power to certify only arises on the happening of a certain event (such as the builder making default) the ascertainment of the event must precede the exercise of the power. Where no method of ascertaining the happening of the event is prescribed in the contract, the question, in case of dispute, must be left to the court, adjudication or arbitration⁴. If the architect has power to ascertain whether the event has happened, he must have actually determined that question before his power to certify arises.

1 *Lawson v Wallasey Local Board* (1882) 11 QBD 229, DC (affd (1883) 48 LT 507, CA); *Brunsdon v Staines Local Board* (1884) Cab & El 272.

2 Cf *Northampton Gas Light Co v Parnell* (1855) 15 CB 630.

3 *Ashwell and Nesbit Ltd v Allen & Co* (1912) 2 Hudson's BC (4th Edn) 462, CA.

4 *Northampton Gas Light Co v Parnell* (1855) 15 CB 630.

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136. Disqualification generally.

A court or arbitrator can disregard an existing certificate or dispense with the need for a certificate if the certifier is disqualified from certifying. The certifier must act impartially¹ and independently and will be disqualified if he fails to do so². He should not give an opportunity to be heard to one party which he does not give to another³. The certifier may be disqualified by reason of some interest which was unknown to one of the parties at the time of the contract⁴ or on the ground of fraud or collusion between the certifier and one of the parties⁵. Collusion between employer and certifier may also amount to an interference by the employer enabling the contractor to recover without a certificate⁶. Even where there is no fraud or bad faith a certifier may be disqualified if he is so influenced by one or other of the parties that he loses his independence⁷.

1 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann.

2 *Hickman & Co v Roberts* [1913] AC 229, HL.

3 *Page v Llandaff and Dinas Powis RDC* (1901) 2 Hudson's BC (4th Edn) 316; *Re Fuerst Bros & Co Ltd and Stephenson* [1951] 1 Lloyd's Rep 429; and see *Armstrong v South London Tramways Co Ltd* (1890) 7 TLR 123, CA; *Eaglesham v McMaster* [1920] 2 KB 169. Such conduct by the certifier might also be contrary to the Human Rights Act 1998 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS), but cf the position of an adjudicator, as to which see *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272, 80 ConLR 115.

4 See para 137 post.

5 *Kimberley v Dick* (1871) LR 13 Eq 1; *Wakefield and Barnsley Banking Co v Normanton Local Board* (1881) 44 LT 697, CA.

6 The border line between collusion and interference is very fine: see para 140 post.

7 *Hickman & Co v Roberts* [1913] AC 229, HL.

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137. Disqualification for interest.

Where a certifier has a sufficient interest in the outcome of his decision to create a likelihood of bias he will be disqualified from exercising the jurisdiction¹. Where objection to a certificate under a contract is taken on the ground of interest, it must be shown that the interest was not known to the complaining party at the time the contract was made². A contractor will be presumed to have known: (1) that the certifier is an agent, and in some cases an employee, of the employer³; (2) that the certifier may have given the employer estimates in respect of the cost of the works and therefore has an interest in seeing that such estimates are not exceeded; (3) that an architect or engineer often advises the employer on the contract which gives such architect or engineer jurisdiction to certify; (4) that an architect or engineer has an interest in keeping down the cost of extras; (5) that, in his capacity as agent, the certifier will have frequent communication with both employer and contractor.

Where the employer is a company, the fact that the certifier is a shareholder may not give rise to disqualification⁴. If the architect or engineer has given the employer a clear undertaking that the cost of the works will not exceed a stated amount, such architect or engineer will be disqualified from certifying⁵. It is material that the certifier is related to or in the debt of one of the parties; such facts ought to be disclosed and if they are not disclosed the certifier may be disqualified⁶.

1 *Dimes v Proprietors of Grand Junction Canal Co* (1852) 3 HL Cas 759 (it is immaterial that the certifier did not allow his interest to affect his judgment).

2 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Matthew v Ollerton* (1693) 4 Mod Rep 226.

3 *Pickthall v Merthyr Tydvil Local Board* (1886) 2 TLR 805; *Jackson v Barry Rly Co* [1893] 1 Ch 238, CA; *Eckersley v Mersey Docks and Harbour Board* [1894] 2 QB 667, CA; *Ives and Barker v Willans* [1894] 2 Ch 478, CA; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann.

4 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; but cf *Sellar v Highland Rly Co* 1919 SC (HL) 19.

5 *Kemp v Rose* (1858) 1 Giff 258; *Kimberley v Dick* (1871) LR 13 Eq 1.

6 *Ludlam v Wilson* (1901) 2 OLR 549, Ont CA.

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138. Disqualification for fraud or collusion.

Neither the employer nor the contractor will be bound by a certificate given as a result of collusion between the certifier and one of the parties. In such a case, the certifier is disqualified¹. It is immaterial whether the fraudulent or collusive conduct took place before or after the contract was made². Where the contractor alleges that the works are complete and that the architect has withheld a certificate in collusion with the employer, he has a good cause of action notwithstanding the absence of the certificate³. Further, a contractor may sue where he alleges that the engineer has fraudulently certified less than what is due to him⁴.

1 *Batterbury v Vyse* (1863) 32 LJEx 177.

2 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515.

3 *Batterbury v Vyse* (1863) 32 LJEx 177. Refusal to certify is not of itself proof of fraud: *Stevenson v Watson* (1879) 4 CPD 148.

4 *Waring v Manchester, Sheffield and Lincolnshire Rly Co* (1849) 18 LJCh 450. As to the position of a quantity surveyor fraudulently making out quantities short see *Priestly v Stone* (1888) 4 TLR 730, CA.

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139. Dispensing with or disregarding certificates generally.

Whether or not there is an existing certificate, either party may sue if the certifier is disqualified¹. The contractor can claim payment if the employer has interfered with the exercise of the certifier's jurisdiction or prevented the issue of a certificate, and both parties may take action if the certifier has exceeded or abused his jurisdiction under the contract². A contractor cannot be restrained by injunction from bringing a claim for payment even though a certificate which is a condition precedent to payment³ has not been granted⁴. The requirement of a certificate as a condition precedent to payment may also, of course, be waived by the employer.

1 See para 136 ante.

2 See para 141 post.

3 See para 129 ante.

4 *Baron de Worms v Mellier* (1873) LR 16 Eq 554.

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140. Interference or prevention by the employer.

If the employer interferes with or prevents the issue of a certificate, the contractor can recover the sums due and the employer cannot rely on the absence of a certificate¹. Alternatively, in such a case the contractor can recover the sums due to him as damages for breach of an implied term that the employer should not interfere with or prevent the exercise of the certifier's jurisdiction² or of an implied term that the employer should act honestly, fairly and reasonably³. An express instruction by the employer that the architect should not issue a further certificate will amount to interference if the architect is in any way influenced by it⁴. There is interference if the employer directs the certifier to value the works in a manner not sanctioned by the contract⁵. A failure to replace an architect who has retired, become incapacitated or died may amount to prevention, allowing the contractor to recover without a certificate⁶.

1 *Hotham v East India Co* (1787) 1 Term Rep 638 at 645 per Ashurst J; *Bliss v Smith* (1865) 34 Beav 508; *Mackay v Dick* (1881) 6 App Cas 251, HL; *Brunsdon v Beresford* (1883) Cab & El 125; *McDonald v Workington Corpn* (1893) 9 TLR 230, CA. In *Smith v Peters* (1875) LR 20 Eq 511 the court granted an order of mandamus directing the employer to permit the certifier to enter the site to make a valuation.

2 *McIntosh v Great Western Rly Co* (1850) 19 LJCh 374; *Smith v Howden Union Rural Sanitary Authority and Fowler* (1890) 2 Hudson's BC (4th Edn) 156; *John Mowlem & Co plc v Eagle Star Insurance Co Ltd* (1992) 62 BLR 126, (1992) 33 ConLR 131.

3 *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 BLR 42, (1996) 49 ConLR 1, CA; but see discussion of this case in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 281-282, [1998] 2 All ER 778 at 790-791, HL, per Lord Hoffmann.

4 *Hickman & Co v Roberts* [1913] AC 229, HL.

5 *Page v Llandaff and Dinas Powis RDC* (1901) 2 Hudson's BC (4th Edn) 316. In *Watts v McLeay* (1911) 19 WLR 916 (Alta) the architect consulted the employer's solicitors and this was held to amount to interference by the employer.

6 *Croudace Ltd v Lambeth London Borough Council* (1986) 33 BLR 20, (1986) 6 ConLR 70, CA.

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141. Abuse or excess of jurisdiction by certifier.

A certifier must act impartially¹. It is possible for a certificate to be attacked on the ground that the certifier did not give the parties an equal opportunity of being heard². While the certifier can use the assistance of others in deciding whether or not he can issue a certificate, the decision must be his own and not that of an assistant³.

The certifier abuses his powers if he persistently refuses to certify⁴ or if he expressly refuses to come to a decision on a matter over which he has jurisdiction by virtue of the contract⁵, and in these circumstances the contractor can recover without a certificate. It seems that the contractor may recover where, in refusing a certificate, a certifier has not conducted himself with impartiality⁶. Again the certifier must act within his jurisdiction and in coming to a decision cannot have regard to matters which are not referred to him by the contract⁷.

Where the certifier acts within the jurisdiction conferred by the contract but has been negligent or was mistaken the certificate cannot be impeached and the parties will be bound by it⁸.

1 *Pawley v Turnbull* (1861) 3 Giff 70; and see *Smith v Howden Union Rural Sanitary Authority and Fowler* (1890) 2 Hudson's BC (4th Edn) 156; *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL.

2 *Page v Llandaff and Dinas Powis RDC* (1901) 2 Hudson's BC (4th Edn) 316; *Re Fuerst Bros & Co Ltd and Stephenson* [1951] 1 Lloyd's Rep 429. The extent to which the *audi alteram partem* rule applies to certifiers is not clear, but see *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326. As to the right to a fair trial (including the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal) under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 6 (now set out in the Human Rights Act 1998) see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134.

3 *Ess v Truscott* (1837) 2 M & W 385; *A-G v Briggs* (1855) 1 Jur NS 1084.

4 *Kellett v New Mills UDC* (1900) 2 Hudson's BC (4th Edn) 298.

5 *Watts v McLeay* (1911) 19 WLR 916, Alta; *Neale v Richardson* [1938] 1 All ER 753, CA.

6 *Pawley v Turnbull* (1861) 3 Giff 70.

7 *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Co)* [1947] AC 428, HL.

8 *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA; *Dixons v Murray-Oboynski* (1997) 86 BLR 16.

UPDATE

141 Abuse or excess of jurisdiction by certifier

NOTE 1--See also *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC), [2006] BLR 113.

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142. Effect of proceedings.

Where a certificate is withheld, the contractor or the employer may have a remedy by way of adjudication, arbitration or court proceedings. In relation to construction contracts¹, an adjudicator is empowered by statute to decide the rights and obligations of the parties, albeit temporarily, notwithstanding the presence or absence of certificates². Subject to the express terms of the contract, the court and the arbitrator may also have such powers³. In none of these proceedings is a certificate a condition precedent to a decision, award or judgment that a sum of money is to be paid by one party to the other⁴.

1 le a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 See *ibid* s 108; and para 207 post. As to adjudication generally see paras 206-219 post.

3 As to the powers of an arbitrator and the court see para 143 post.

4 *Brodie v Cardiff Corpn* [1919] AC 337, HL; *Neale v Richardson* [1938] 1 All ER 753, 82 Sol Jo 331, CA; *Prestige & Co Ltd v Brettell* [1938] 4 All ER 346, 82 Sol Jo 929, CA; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, [1998] 2 All ER 778, HL.

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143. Powers of the arbitrator and the courts.

Where a contract contains an arbitration clause in sufficiently wide terms, the decisions of the certifier may be reviewed by the arbitrator¹. The extent of the arbitrator's powers will depend on the wording of the arbitration clause. However, the arbitrator is commonly given an express power to open up, review or revise the decisions of the certifier.

In certain cases, despite an arbitration clause, on the proper construction of the contract some decisions of the certifier will not be subject to review². Thus where matters left by the contract to the decision or determination of the engineer were excepted from the arbitration clause it was held that an engineer's certificate of completion and satisfaction was binding³.

The court has an inherent power to open up, review and revise any certificate, opinion, decision, requirement or notice of a certifier and to determine matters in dispute as if they had not been given unless the contract in question makes clear by express words that such powers are to be exercised by the arbitrator only⁴.

The powers of the arbitrator and of the courts summarised in this paragraph would, it is thought, extend to the review both of the certifier's decision to withhold a certificate and to the contents of any certificate that had been given. These powers do not, however, extend to the review of certificates which are provided by the contract to be final and conclusive⁵.

1 See paras 199-205 post; and ARBITRATION.

2 *Scott v Liverpool Corpn* (1858) 28 LJCh 230; *Clemence v Clarke* (1879) 2 Hudson's BC (4th Edn) 54, CA; and see also *Eaglesham v McMaster* [1920] 2 KB 169.

3 *Re Meadows and Kenworthy* (1897) 2 Hudson's BC (4th Edn) 265, HL; *Ata Ul Haq v City Council of Nairobi* (1962) 28 BLR 76, PC.

4 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, [1998] 2 All ER 778, HL; overruling *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644, [1984] 2 All ER 175, CA. Prior to this decision of the House of Lords, it was thought that the court could review the certifier's decision only if the parties so agreed pursuant to the Supreme Court Act 1981 s 43A (as added) (see COURTS vol 10 (Reissue) para 608) or the arbitration or certification machinery had broken down (see eg *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31).

5 See para 134 ante.

UPDATE

143 Powers of the arbitrator and the courts

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(2) REMUNERATION/(i) Amounts Payable/144. Price fixed by the contract.

(2) REMUNERATION

(i) Amounts Payable

144. Price fixed by the contract.

There are two ways in which the price may be fixed by the contract. First, the contractor may have undertaken to execute specified work for a specified sum, in which case a claim by him for the lump sum price or an agreed instalment is a liquidated demand and he can apply for summary judgment¹. Secondly, where the extent of the work is at the time of the contract uncertain, the contract may provide that the price be ascertained by measuring the work done against items in a bill of quantities or in a schedule of rates²; in such a case the contractor can recover the price when the measurement has been certified³.

In both cases, the employer can only avoid paying the contract price by showing that the contract was frustrated⁴ or that it was void ab initio or that by reason of the number of variations the identity of the original contract has been lost⁵. In the very rare cases where these arguments succeed, the contractor will be entitled to recover on a quantum meruit basis⁶.

1 Where the price is payable by instalments summary judgment may be obtained in respect of each instalment: *Workman, Clark & Co Ltd v Lloyd Brasileiro* [1908] 1 KB 968, CA. See para 8 ante for the different forms of building contract.

2 See *Jamieson v M'Innes* (1887) 15 R 17, Ct of Sess; *Wilkie v Hamilton Lodging House Co* (1902) 4 F 951, Ct of Sess.

3 See *Whitaker v Dunn* (1887) 3 TLR 602; see also *Stephenson v Weir* (1879) 4 LR Ir 369; *Meade v Mouillott* (1879) 4 LR Ir 207.

4 See para 113 ante. A quantum meruit claim (see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq) will only lie in respect of work done after the date of frustration; the Law Reform (Frustrated Contracts) Act 1943 (see CONTRACT vol 9(1) (Reissue) para 913 et seq) will apply to work done before the date of frustration.

5 See eg *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA; cf *McAlpine Humberoak Ltd v McDermott International Inc* (1992) 58 BLR 1, (1992) 28 ConLR 76, CA. Providing there was an instruction to do work and an acceptance of that instruction, there was a contract and the law would imply into it an obligation to pay a reasonable sum for that work: *ACT Construction Ltd v E Clarke & Son (Coaches) Ltd* [2002] EWCA Civ 972, [2002] All ER (D) 241 (Jul).

6 In *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186, BC CA, there is an instructive discussion of the question (held contractor not entitled to a quantum meruit).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/3. CERTIFICATION AND REMUNERATION/(2) REMUNERATION/(i) Amounts Payable/145. Adjustments where the price is fixed by the contract.

145. Adjustments where the price is fixed by the contract.

In the modern standard form contracts¹, there may be adjustments to the contract price by reason of express terms of the contract. These terms are of three types: (1) clauses, known as 'fluctuation' clauses, entitling the contractor to be reimbursed for any increase in the cost of labour or materials or giving the employer the benefit of any decrease in such costs²; (2) clauses requiring an adjustment to the contract price in the event of variations³; (3) clauses by virtue of which a contractor may claim other increases in the contract price⁴. In some cases the subject matter of claim permitted by the contract may overlap with circumstances which amount *prima facie* to a breach by the employer and in such a case the right of the contractor to claim additional payment under the contract is generally additional to and not in substitution of his right to claim damages for breach⁵. The terms of the contract will often make a notice in writing a condition precedent to a claim by the contractor; it is a question of construction whether the contractor can recover under the contract in the absence of a notice which complies with the terms of the contract⁶.

Extra work may be required by the employer outside the contract if it is carried out after completion of the original contract work⁷ or it is not within the scope of the variation clause⁸. The employer will generally be liable to pay a reasonable price for such work carried out at his request⁹.

1 As to standard forms of contract see para 2 ante.

2 A fluctuation clause relating to the cost of labour did not apply to a bonus incentive scheme operated by the contractors: *William Sindall Ltd v North West Thames Regional Health Authority* [1977] ICR 294, 4 BLR 151, HL.

3 As to the valuation of variations see para 146 post. As to variations generally see para 74 ante.

4 Many contracts include provisions for the recovery of loss and expense caused to the contractor by events outside his control.

5 See *Blackford & Sons (Calne) Ltd v Borough of Christchurch* [1962] 1 Lloyd's Rep 349; *Merton London Borough Council v Leach* (1985) 32 BLR 51; *Architectural Installation Services Ltd v James Gibbons (Windows) Ltd* (1989) 46 BLR 91; *Fairclough Building Ltd v Vale of Belvoir* (1990) 56 BLR 74.

6 *Blackford & Sons (Calne) Ltd v Borough of Christchurch* [1962] 1 Lloyd's Rep 349 (a case on ICE conditions of contract); *Tersons Ltd v Stevenage Development Corp* [1965] 1 QB 37, [1963] 3 All ER 863, CA; *Merton London Borough Council v Leach* (1985) 32 BLR 51.

7 *Russell v Sa da Bandeira* (1862) 13 CBNS 149.

8 *Costain Civil Engineering Ltd v Zanen Dredging and Contracting Co Ltd* (1996) 85 BLR 77.

9 *Russell v Sa da Bandeira* (1862) 13 CBNS 149; *Astilleros Canarios SA v Cape Hatteras Shipping Co Inc* [1982] 1 Lloyd's Rep 518.

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(ii) Valuing Variations

146. Express provision.

The architect or engineer may be given power to value additional or omitted work and to add the sum arrived at to, or deduct it from, the contract sum. Generally the contract will provide that additional work of similar character to, and executed under similar conditions as, the contract work should be valued at the rates and prices contained in the bills of quantities or schedule of rates¹. Where there is no appropriate rate in the bills of quantities or schedule of rates, the architect or engineer may have power to adjust the rates provided or to fix a rate, but where it is impossible to measure the varied work the contractor may be entitled to be paid on daywork rates. The decision of the architect or engineer as to the valuation of variations may be final but such decision is likely to be capable of review in adjudication or court proceedings or (subject to the extent of the powers conferred on the arbitrator) in arbitration².

1 See eg *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2000] BLR 247, 69 ConLR 27, CA.

2 See paras 74, 142-143 ante.

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147. No express provision.

Where there is an express provision in the contract for variations to the contract work but no machinery for ascertaining the value, the parties will be bound by any agreement as to the price of such works, and in default of agreement the employer must pay a reasonable sum¹.

Where there is no express provision in the contract the contractor will be entitled to claim payment for the variations if he can establish a new contract or a promise to pay for the varied works by showing that the employer, or the architect as agent of the employer acting within the scope of his authority², ordered or accepted the works or allowed them to proceed in circumstances where the contractor is led to believe that he will be paid for them. Where the work has been ordered or accepted by the architect acting outside his authority the contractor will still be entitled to be paid if the employer subsequently ratifies the architect's orders³.

Where an order or approval in writing is a condition precedent to payment the contractor will not be able to recover where the condition has not been complied with⁴ unless he can show that there was an implied promise by the employer to pay for the variations⁵ or he can show that the varied works were not covered by the contract⁶.

1 As to the circumstances in which, to value a variation, the rates contained in the bill of quantities must be used, or such rates may be discarded in favour of a 'fair valuation' see *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2000] BLR 247, 69 ConLR 27, CA.

2 *R v Peto* (1826) 1 Y & J 37; *Cooper v Langdon* (1841) 9 M & W 60; *Forrest v Scottish County Investment Co* 1916 SC (HL) 28; *Ashwell and Nesbit Ltd v Allen & Co* (1912) 2 Hudson's BC (4th Edn) 462, CA.

3 See AGENCY vol 1 (2008) PARA 57 et seq.

4 *Kirk v Bromley Union Guardians* (1848) 12 Jur 85; *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Taverner & Co Ltd v Glamorgan County Council* (1941) 57 TLR 243. The architect has no authority to waive the requirements for written orders: *Kirk v Bromley Union Guardians* supra.

5 *Molloy v Liebe* (1910) 102 LT 616, PC; *Taverner & Co Ltd v Glamorgan County Council* (1941) 57 TLR 243.

6 See para 63 ante.

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(iii) Method of Payment

148. Instalment payments.

Most building or engineering contracts expressly entitle the contractor to be paid instalments of the contract sum.

A contractor under a construction contract¹ is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless it is specified in the contract that the duration is to be less than 45 days, or it is agreed between the parties that the duration of the work is estimated to be less than 45 days². The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due³. In the absence of such agreement, the relevant provisions of scheme for construction contracts will apply⁴.

In the majority of contracts, payments on account are made to the contractor by way of interim certificates⁵. Sometimes the contract will provide that a specified part of the contract price will be paid when the works reach a particular stage, for instance second floor level⁶.

Where there is no express or statutory provision for payments on account and where the contract is not entire in the sense that the completion of the whole is a condition precedent to payment⁷, there may be an implied term that the employer will pay the contractor a reasonable sum on account from time to time as the work progresses⁸.

1 I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 See *ibid* s 109(1); and para 155 post.

3 See *ibid* s 109(2); and para 155 post.

4 See *ibid* s 109(3); and para 155 post. As to payment provisions under the scheme for construction contracts see para 160 post.

5 See paras 130-132 ante.

6 *Terry v Duntze* (1795) 2 Hy Bl 389; *Needler v Guest* (1647) Aleyn 9.

7 See para 8 ante.

8 *Roberts v Havelock* (1832) 3 B & Ad 404; *The Tergeste* [1903] P 26 at 34 per Phillimore J. See also para 429 et seq post.

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149. Retention money.

The contract may provide that the employer is entitled to deduct from sums due to the contractor by way of interim payment, a specified percentage as 'retention' money. The retention money is retained by the employer as security for the due performance of the contract by the contractor and as a fund to be drawn upon either to complete the work or to rectify defects should the contractor fail to do so. Some contracts provide for the employer's interest in the retention to be fiduciary as trustee¹ although the employer may be allowed recourse to it in respect of debts due to him arising out of the contract. On the completion of the work, in the absence of some other express provision², the employer must account for retention money.

¹ The court may grant the contractor an injunction requiring the employer to pay the sums into a separate account (see *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30; *Henry Boot Building Ltd v Croydon Hotel and Leisure Co Ltd* (1985) 36 BLR 41, CA; *Wates Construction (London) Ltd v Franthom Property Ltd* (1991) 53 BLR 23, CA; but cf *Herbert Construction (UK) Ltd v Atlantic Estates plc* (1993) 70 BLR 46, (1993) CILL 858, CA; *PC Harrington Contractors Ltd v Co-Partnership Developments Ltd* (1998) 88 BLR 44, CA) and if a separate fund is created the retention money will form the subject of a trust and so be protected if the employer goes into liquidation. However an injunction will not be granted after liquidation and the contractor will be an unsecured creditor: see *Re Jartray Developments Ltd* (1982) 22 BLR 134; *MacJordan Construction v Brookmount Erostin* (1991) 56 BLR 1, CA.

² Eg that some or all of the retention money will not be paid out until the end of a defects or maintenance period: see para 125 ante.

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150. Bonus payments.

The contract may provide that the contractor is to be entitled to an addition to the contract sum in the event of his completing the works before the stipulated date¹. The contractor will be entitled to claim the bonus if he completes before the date stated in the bonus clause, but if he is prevented from earning the bonus by some act on the part of the employer he can claim damages but the measure of such damages may not be the amount of the bonus². Liability to pay liquidated damages for late completion does not imply a right to an equivalent or any amount as a bonus for early completion; an employer may not wish early completion³. Delay caused by a nominated sub-contractor does not amount to prevention by the employer⁴.

1 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72 at 78; *Mackintosh v Midland Counties Rly Co* (1845) 14 M & W 548.

2 *Bywaters & Sons v Curnick & Co* (1906) 2 Hudson's BC (4th Edn) 393, CA; cf *Mackintosh v Midland Counties Rly Co* (1845) 14 M & W 548 at 558 per Alderson B. See also *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31.

3 Eg a developer who has not sold or let the building.

4 *Leslie & Co Ltd v Managers of Metropolitan Asylums District* (1901) 68 JP 86, CA. As to nominated sub-contractors see para 41 ante.

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151. Interest.

Generally the contractor will not be entitled to interest on any sums due to him unless there is an express or implied term in the contract to this effect¹. The Late Payment of Commercial Debts (Interest) Act 1998 provides that it is an implied term of any contract to which that Act applies² that any 'qualifying debt created by the contract'³ carries simple interest at a rate prescribed by Order⁴. The Late Payment of Commercial Debts (Interest) Act 1998 applies to contracts for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business, other than an excepted contract⁵.

Where the contractor takes legal action to recover sums due to him or to claim damages, a court of record⁶ or an arbitrator⁷ may award interest at the rate it thinks fit. In the absence of the exercise of this discretion interest is not payable on a claim in debt unless there is an express or implied agreement or mercantile usage⁸. Where the claim is for breach of contract, interest can be recovered as special damages⁹ and not otherwise¹⁰. There is no mercantile usage whereby interest is payable on a debt due under a building contract¹¹.

1 Where the contract contains provisions for the payment of loss and expense the cost of financing the additional expenditure incurred as a result of the events giving rise to the entitlement to loss and expense may be recovered: see *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1, CA; *Rees and Kirby Ltd v Swansea City Council* (1985) 30 BLR 1, CA.

2 As to the contracts to which the Late Payment of Commercial Debts (Interest) Act 1998 applies see s 2 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 221.

3 See *ibid* s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 220 et seq.

4 See *ibid* s 6; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 230. The rate of statutory interest so prescribed is currently 8% over the official dealing rate of the Bank of England per annum: see the Late Payment of Commercial Debts (Rate of Interest) (No 2) Order 1998, SI 1998/2765, art 4.

5 See the Late Payment of Commercial Debts (Interest) Act 1998 s 2; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 221.

6 See the Supreme Court Act 1981 s 35A (added by the Administration of Justice Act 1982 s 15(1), Sch 1 Pt I); and see *Food Corpn of India v Marastro Cia Naviera SA, The Trade Fortitude* [1986] 3 All ER 500, [1987] 1 WLR 134, CA. As to courts of record see COURTS vol 10 (Reissue) para 308.

7 *Chandris v Isbrandtsen-Moller Co* [1951] 1 KB 240 at 262-263, [1950] 2 All ER 618 at 623, CA, per Tucker LJ; and see the Arbitration Act 1996 s 49; and ARBITRATION vol 2 (2008) PARA 1260. Note that the arbitrator is empowered to award compound as well as simple interest.

8 *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120; *affd* [1893] AC 429, HL.

9 *President of India v La Pintada Cia Navegacion SA* [1985] AC 104, [1984] 2 All ER 773, HL; *President of India v Lips Maritime Corpn* [1988] AC 395, [1987] 3 All ER 110, HL. Interest must be pleaded and proved: *Hutchinson v Harris* (1978) 10 BLR 19 at 42, CA, per Stephenson LJ.

10 *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 140, CA, per Lindley LJ; *Barclay v Harris and Cross* (1915) 85 LJB 115.

11 But see note 1 *supra*.

UPDATE

151 Interest

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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152. Appropriation of payments.

There is a general rule of law that, in the absence of any appropriation by the employer at the time of payment, the contractor is at liberty to appropriate a general payment on account to any debt he pleases¹. However, when a payment has once been appropriated the appropriation cannot be varied subsequently without the consent of the debtor². It is especially important, in the case of building and engineering contracts, to remember that the appropriation must be to a debt³. A contractor, therefore, cannot get over the non-fulfilment of a condition precedent to his right to payment by purporting to appropriate a payment for extras not properly ordered in accordance with the contract⁴. Accordingly, when the contractor constructs additional works which are not ordered in a manner prescribed by the contract, or which have not been certified for by the architect when such certificate is a condition precedent to payment, no debt in respect of this additional work has been incurred by the employer, and the contractor cannot alter the position of the employer by purporting to appropriate a payment to this claim⁵. Where a contractor performs work, part of which is unlawful by reason of its being in excess of the work licensed, he cannot appropriate payments made generally on account of work done to the unlawful work, payment for which is unrecoverable⁶, so as to enable him to obtain sums in addition to those owing for the lawful work⁷.

1 *Thompson v Hudson* (1871) 6 Ch App 320; *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572; *Cory Bros & Co Ltd v Turkish SS Mecca (Owners), The Mecca* [1897] AC 286, HL; and cf *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL. See CONTRACT vol 9(1) (Reissue) para 956 et seq.

2 *Mahomed Jan v Ganga Bishnu Singh* (1911) LR 38 Ind App 80, PC.

3 *Lamprell v Billericay Union* (1849) 3 Exch 283 at 307 per Rolfe B.

4 A creditor receiving money on account is not authorised to apply it towards the satisfaction of any claim which does not rest on some legal or equitable demand against the debtor: *Lamprell v Billericay Union* (1849) 3 Exch 283 at 307 per Rolfe B.

5 *Lamprell v Billericay Union* (1849) 3 Exch 283.

6 *Dennis & Co Ltd v Munn* [1949] 2 KB 327, [1949] 1 All ER 616, CA.

7 *A Smith & Son (Bognor Regis) Ltd v Walker* [1952] 2 QB 319, [1952] 1 All ER 1008, CA.

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153. Where price is not fixed by the contract.

Where the work is carried out in the reasonable expectation of payment but either there is no contract governing that work¹ or the contract does not specify the price to be paid² the contractor is entitled to be paid on a quantum meruit basis³. In addition the contractor may possibly be entitled to be paid on a quantum meruit basis where the employer has repudiated the contract⁴, but there is conflicting authority on this point and it is more likely that the contractor has no such entitlement⁵. An ascertainment of a reasonable price for the work is a question of fact depending on all the circumstances. A reasonable price includes payment for the skill, supervision and services of the contractor as well as for the materials and labour supplied⁶. A contract to pay the market price has been held to mean payment of the market price ascertained at the date of the contract⁷. Where the bills of quantities or schedule of rates failed to give an item for necessary work, the contractor may be able to claim a reasonable price in respect of that work, if there is no express contractual term to cover such a situation⁸.

The contractor may also have a restitutionary remedy entitling him to payment of the value of a benefit conferred on the employer where it would be inequitable for the employer to retain this benefit⁹.

1 This includes situations where the original contract was void (see eg *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA; and *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA); unenforceable (*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC); frustrated (see para 113 ante: a quantum meruit claim (see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq) will only lie in respect of work done after the date of frustration; the Law Reform (Frustrated Contracts) Act 1943 (see CONTRACT vol 9(1) (Reissue) para 913 et seq) will apply to work done before the date of frustration); where the circumstances of the contract have changed so that the contract becomes inapplicable to all or part of the works (see eg *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, [1952] 2 All ER 617, HL); or the scope of the work has increased greatly (see eg *Sir Lindsay Parkinson & Co Ltd v Works and Public Buildings Comrs* [1949] 2 KB 632, [1950] 1 All ER 208, CA; but note that this is a case on very special facts; and cf *McAlpine Humeroak Ltd v McDermott International Inc* (1992) 58 BLR 1, (1992) 28 ConLR 76, CA); or where negotiation of terms had broken down (see *Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd (t/a Nuclear Civil Constructors (a firm)) v Atomic Power Constructors Ltd* [1962] 3 All ER 1035, [1963] 1 WLR 333; *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234; and *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, 24 BLR 94; but cf *Regalian Properties plc v London Docklands Development Corpn* [1995] 1 All ER 1005, [1995] 1 WLR 212); or where the work is not within the scope of the variation clause (see *Costain Civil Engineering Ltd v Zanen Dredging and Contracting Co Ltd* (1996) 85 BLR 77).

2 *Moffat v Laurie* (1855) 15 CB 583; and see the Supply of Goods and Services Act 1982 s 15 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 99).

3 Whether payment will be deferred until the completion of the contract or paid in instalments (see para 148 ante) will in such a case depend upon the construction of the contract: *Roberts v Havelock* (1832) 3 B & Ad 404. For descriptions of the different types of contract used in relation to building and engineering works see paras 2, 8 ante. As to quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

4 *Lodder v Slowey* [1904] AC 442, PC; *ERDC Construction Ltd v HM Love & Co* (1994) 70 BLR 67, Ct of Sess.

5 See para 123 ante.

6 *Grafton v Armitage* (1845) 2 CB 336; *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, 24 BLR 94. A claim for work and labour only does not cover materials which should be specifically claimed: see *Heath v Freeland* (1836) 1 M & W 543; *Cotterill v Apsey* (1815) 6 Taunt 322.

7 *Mallock v Hodghton* (1849) 12 D 215, Ct of Sess.

8 *Re Walton-on-the-Naze UDC and Moran* (1905) 2 Hudson's BC (4th Edn) 376.

9 *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA; *William Lacey (Hounslow) Ltd v Davis* [1957] 2 All ER 712, [1957] 1 WLR 932; *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, 24 BLR 94; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC. Cf *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186, BC CA; *Regalian Properties plc v London Docklands Development Corp* [1995] 1 All ER 1005, [1995] 1 WLR 212.

UPDATE

153 Where price is not fixed by the contract

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(iv) Payment Provisions in Construction Contracts

A. INTRODUCTION

154. Operation of the Housing Grants, Construction and Regeneration Act 1996 and the scheme.

Part II of the Housing Grants, Construction and Regeneration Act 1996¹ introduced statutory requirements in relation to payment provisions in construction contracts². Construction contracts must comply with those statutory requirements, and where the contract does not so comply, the payment provisions of the scheme for construction contracts apply instead³.

1 le the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended). As to the application of Pt II (as amended) see para 10 ante.

2 See *ibid* ss 109-113; and paras 155-159 post. The text refers to a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

3 The scheme is contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, regs 2-4, Schedule: see paras 160, 207 et seq post. As to the payment provisions of the scheme for construction contracts see para 160 post. As to the power to make the scheme for construction contracts see para 9 ante.

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B. REQUIREMENTS UNDER THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

155. Entitlement to stage payments.

A party to a construction contract¹ is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless it is specified in the contract that the duration of the work is to be less than 45 days², or it is agreed³ between the parties that the duration of the work is estimated to be less than 45 days⁴. The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due⁵. In the absence of such agreement, the relevant provisions of the scheme for construction contracts apply⁶.

1 Ie a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 For the purposes of reckoning periods of time for *ibid* Pt II (ss 104-117) (as amended): (1) where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date (s 116(1), (2)); and (2) where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 (see *TIME* vol 97 (2010) PARA 321) is a bank holiday in England and Wales or, as the case may be, in Scotland, that day is also excluded (s 116(3)). As to reckoning periods of time generally see *TIME*.

3 Agreements are effective for the purposes of *ibid* Pt II (as amended) only if in writing: see para 10 ante.

4 *Ibid* s 109(1). References in ss 110, 111 and 113 (see paras 156-157, 159 post) to a payment under the contract include a payment by virtue of s 109: s 109(4).

5 *Ibid* s 109(2).

6 *Ibid* s 109(3). As to the payment provisions of the scheme for construction contracts see para 160 post. As to the power to make the scheme for construction contracts see para 9 ante.

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156. Dates for payment.

Every construction contract¹ must: (1) provide an adequate mechanism for determining what payments become due under the contract², and when they become due; and (2) provide for a final date for payment in relation to any sum which becomes due³. The parties are free to agree⁴ how long the period is to be between the date on which a sum becomes due and the final date for payment⁵.

Every construction contract must also provide for the giving of notice by a party not later than five days⁶ after the date on which a payment becomes due from him under the contract, or would have become due if:

- 53 (a) the other party had carried out his obligations under the contract⁷; and
- 54 (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts⁸,

specifying the amount, if any, of the payment made or proposed to be made, and the basis on which that amount was calculated⁹.

If or to the extent that a contract does not contain such provisions as described above, the relevant provisions of the scheme for construction contracts apply¹⁰.

1 I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 Ibid s 110(1)(a). References to a payment under the contract include a payment by virtue of s 109 (see para 155 ante): s 109(4).

3 Ibid s 110(1)(b).

4 Agreements are effective for the purposes of ibid Pt II (as amended) only if in writing: see para 10 ante.

5 Ibid s 110(2).

6 As to the reckoning of periods of time see para 155 note 2 ante.

7 Housing Grants, Construction and Regeneration Act 1996 s 110(2)(a).

8 Ibid s 110(2)(b).

9 Ibid s 110(2).

10 Ibid s 110(3). As to the payment provisions of the scheme for construction contracts see para 160 post. As to the power to make the scheme for construction contracts see para 9 ante.

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157. Notice of intention to withhold payment.

A party to a construction contract¹ may not withhold payment after the final date for payment of a sum due under the contract² unless he has given an effective notice³ of intention to withhold payment⁴. To be effective such a notice must specify the amount proposed to be withheld and the ground for withholding payment, or if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment⁵. The parties are free to agree what that prescribed period is to be, and in the absence of such agreement, the period is that provided by the scheme for construction contracts⁶.

Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication⁷ it is decided that the whole or part of the amount ought to be paid, the decision is to be construed as requiring payment not later than seven days from the date of the decision⁸, or the date which apart from the notice would have been the final date for payment, whichever is the later⁹.

1 Ie a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 References to a payment under the contract include a payment by virtue of *ibid* s 109 (see para 155 ante): s 109(4).

3 References in *ibid* Pt II (ss 104-117) (as amended) to a notice or other document include any form of communication in writing and references to service is to be construed accordingly: s 115(6). The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of Pt II: s 115(1). If or to the extent that there is no such agreement a notice or other document may be served on a person by any effective means, and if a notice or other document is addressed, pre-paid and delivered by post: (1) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address; or (2) where the addressee is a body corporate, to the body's registered or principal office, it is treated as effectively served: s 115(2)-(4). Section 115 does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court: s 115(5). Agreements are effective for the purposes of Pt II (as amended) only if in writing: see para 10 ante.

4 *Ibid* s 111(1). The notice mentioned in s 110(2) (see para 156 ante) may suffice as a notice of intention to withhold payment if it complies with the requirements of s 111 (see the text and notes 5-9 *infra*): s 111(1).

The notice must be in writing and be sent in response to an application for payment: *Strathmore Building Services v Greig* 2000 SLT 815, Ct of Sess.

5 Housing Grants, Construction and Regeneration Act 1996 s 111(2). In the absence of an effective notice the right to deduct money by way of set-off is excluded: *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187, 70 ConLR 51. However, 'the absence of a timeous notice to withhold payment does not relieve the party making the claim of the ordinary burden of showing that he is entitled under the contract to receive the payment he claims': *SL Timber Systems Ltd v Carillion Construction Ltd* [2001] BLR 516 at 524, Ct of Sess, per Lord Macfadyen.

6 Housing Grants, Construction and Regeneration Act 1996 s 111(3). As to the payment provisions of the scheme for construction contracts see para 160 post. As to the power to make the scheme for construction contracts see para 9 ante.

7 As to the right to refer disputes to adjudication see para 206 *et seq* post.

- 8 As to the reckoning of periods of time see para 155 note 2 ante.
- 9 Housing Grants, Construction and Regeneration Act 1996 s 111(4).

UPDATE

157 Notice of intention to withhold payment

NOTES--Nothing in the 1996 Act s 111 entitles a court to refuse to grant a stay under the Arbitration Act 1996 s 9 (see ARBITRATION vol 2 (2008) PARA 1222) if it would otherwise be granted: *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, [2005] BLR 63.

NOTE 3--See *Rhode v Markham-David* [2007] EWHC 1408 (TCC), [2007] All ER (D) 326 (Jul) (sending documents by special delivery to last known residence did not constitute delivery by post where recipient did not sign for documents and documents returned to post office).

NOTE 4--See *Reinwood Ltd v L Brown & Sons Ltd* [2008] UKHL 12, [2008] 2 All ER 885, [2008] 1 WLR 696 (Joint Contracts Tribunal standard form; employer permitted to give notice of intention to withhold payment if architect issued certificate of non-completion; employer entitled to withhold payment after giving notice despite architect's subsequent cancellation of certificate of non-completion).

NOTE 5--A provision that a party to a construction contract cannot, unless he has given notice of intention to do so, withhold payment after the final date for payment of a sum due under the contract, does not apply to a lawful ground for withholding payment when it has not been possible for notice to have been given within the statutory time frame: *Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd* [2007] UKHL 18, [2007] 3 All ER 889; applied in *Pierce Design International Ltd v Johnston* [2007] EWHC 1691 (TCC), (2007) 115 ConLR 110. See also *Windglass Windows Ltd v Capital Skyline Construction Ltd* [2009] EWHC 2022 (TCC), (2009) 126 ConLR 118 (withholding notices ineffective as grounds not stated).

See *Rupert Morgan Building Services (LCC) v Jervis* [2003] EWCA Civ 1563, [2004] 1 WLR 1867. The 1996 Act s 111 is intended to apply only to the withholding of payments in respect of which the contract provides a final date of payment; it does not apply to payments due in consequence of an adjudicator's decision: *Construction Centre Group Ltd v Highland Council* 2003 SLT 623, IH.

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158. Right to suspend performance for non-payment.

Where a sum due under a construction contract¹ is not paid in full by the final date for payment and no effective notice to withhold payment has been given², the person to whom the sum is due has the right, without prejudice to any other right or remedy, to suspend performance of his obligations under the contract to the party by whom payment ought to have been made ('the party in default')³. The right may not be exercised without first giving to the party in default at least seven days' notice of intention⁴ to suspend performance, stating the ground or grounds on which it is intended to suspend performance. The right to suspend performance ceases when the party in default makes payment in full of the amount due⁵.

Any period during which performance is suspended in pursuance of the right so conferred is to be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right⁶. Where the contractual time limit is set by reference to a date rather than a period, the date is to be adjusted accordingly⁷.

1 I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 As to notice of intention to withhold payment see para 157 ante.

3 Housing Grants, Construction and Regeneration Act 1996 s 112(1).

4 References in *ibid* Pt II (ss 104-117) (as amended) to a notice or other document include any form of communication in writing and references to service are to be construed accordingly: s 115(6). As to the service of notices and documents see para 157 note 3 ante. As to the reckoning of periods of time see para 155 note 2 ante.

5 *Ibid* s 112(2).

6 *Ibid* s 112(3).

7 *Ibid* s 112(4).

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159. Prohibition of conditional payment provisions.

A provision making payment under a construction contract¹ conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract, directly or indirectly, a condition of payment by that third person, is insolvent². Where a provision is rendered ineffective in this way, the parties are free to agree³ other terms for payment, and in the absence of such agreement, the relevant provisions of the scheme for construction contracts apply⁴.

1 I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante. References to a payment under the contract include a payment by virtue of s 109 (see para 155 ante): s 109(4).

For these purposes a company becomes insolvent: (1) on the making of an administration order against it under the Insolvency Act 1986 Pt II (ss 8-27) (as amended); (2) on the appointment of an administrative receiver or a receiver or manager of its property under Pt III Ch I (ss 28-49) (as amended), or the appointment of a receiver under Pt III Ch II (ss 50-71) (as amended); (3) on the passing of a resolution for voluntary winding-up without a declaration of solvency under s 89; or (4) on the making of a winding-up order under Pt IV (ss 73-219) (as amended) or Pt V (ss 220-229) (as amended): Housing Grants, Construction and Regeneration Act 1996 s 113(2). For these purposes, a partnership becomes insolvent on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under s 420 or when sequestration is awarded on the estate of the partnership under the Bankruptcy (Scotland) Act 1985 s 12 or the partnership grants a trust deed for its creditors: Housing Grants, Construction and Regeneration Act 1996 s 113(3). For these purposes, an individual becomes insolvent on the making of a bankruptcy order against him under the Insolvency Act 1986 Pt IX (ss 264-371) (as amended) or on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors: Housing Grants, Construction and Regeneration Act 1996 s 113(4). As to individual insolvency see BANKRUPTCY AND INDIVIDUAL INSOLVENCY. A company, partnership or individual is also to be treated as insolvent on the occurrence of any event corresponding to those specified in s 113(2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom: s 113(5). For the meaning of 'United Kingdom' see para 25 note 10 ante.

2 Housing Grants, Construction and Regeneration Act 1996 s 113(1).

3 Agreements are effective for the purposes of *ibid* Pt II (as amended) only if in writing: see para 10 ante.

4 *Ibid* s 113(6). As to the payment provisions of the scheme for construction contracts see para 160 post. As to the power to make the scheme for construction contracts see para 9 ante.

UPDATE

159 Prohibition of conditional payment provisions

NOTE 1--Now, head (1) when it enters administration within the meaning of the Insolvency Act 1986 Sch B1 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 145): Housing Grants, Construction and Regeneration Act 1996 s 113(2) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096).

NOTE 2--A contractor who mis-drafts a pay when paid clause with the effect that it is not in accordance with the relevant legislation, cannot then seek to relieve himself from liability on the basis that there is a lack of clarity in the provision: *William Hare Ltd v*

Shepherd Construction Ltd [2010] EWCA Civ 283, [2010] 22 EG 108, [2010] All ER (D) 168 (Mar).

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C. REQUIREMENTS UNDER THE SCHEME FOR CONSTRUCTION CONTRACTS

160. Payment provisions under the scheme for construction contracts.

Where a construction contract¹ does not comply with the requirements of the payment provisions under the Housing Grants, Construction and Regeneration Act 1996², the relevant provisions of the scheme have effect.

Where the parties to a relevant construction contract³ fail to agree: (1) the amount of any instalment or stage or periodic payment for any work under the contract⁴; or (2) the intervals at which, or circumstances in which, such payments become due under that contract⁵; or (3) both the amount of any instalment or stage or periodic payment and the intervals at which or circumstances in which such payments become due⁶, then the relevant provisions of the scheme for construction contracts⁷ apply⁸. The scheme provides that the amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period⁹ is the difference between:

- 55 (a) the aggregate of the following amounts:
 - 3 5. (i) an amount equal to the value of any work¹⁰ performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with head (ii) below)¹¹;
 6. (ii) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period¹²; and
 7. (iii) any other amount or sum which the contract specifies is payable during or in respect of the period from the commencement of the contract to the end of the relevant period¹³; and
- 4 56 (b) the aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period¹⁴.

An amount so calculated must not exceed the difference between the contract price and the aggregate of the instalments or stage or periodic payments which have become due¹⁵.

Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions¹⁶ of the scheme apply¹⁷. The scheme provides that any payment by way of instalments or stage or periodic payments in respect of a relevant period is due on whichever of the following dates occurs later: (A) the expiry of seven days following the relevant period; or (B) the making of a claim by the payee¹⁸. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the

difference, if any, between the contract price, and the aggregate of any instalment or stage or periodic payments which have become due under the contract, is due on the expiry of 30 days following completion of the work or the making of a claim by the payee, whichever is the later¹⁹. Payment of the contract price under a construction contract (not being a relevant construction contract) is due on the expiry of 30 days following the completion of the work or the making of a claim by the payee, whichever is the later²⁰. Any other payment under a construction contract is due on the expiry of seven days following the completion of the work to which the payment relates or the making of a claim by the payee, whichever is the later²¹. Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the final date for the making of any payment of a kind mentioned above²² is 17 days from the date that payment becomes due²³.

A party to a construction contract must, not later than five days after the date on which any payment:

- 57 (aa) becomes due from him²⁴; or
- 58 (bb) would have become due, if the other party had carried out his obligations under the contract, and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts²⁵,

give notice to the other party to the contract specifying the amount, if any, of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated²⁶.

Any notice of intention to withhold payment after the final date for payment of a sum due under the contract²⁷ must be given not later than the prescribed²⁸ period²⁹.

The scheme also makes provision in relation to relevant construction contracts and any other construction contracts for the situation where a provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective³⁰, and the parties have not agreed other terms for payment³¹.

1 Ie a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 Ie *ibid* s 108 (see para 207 post), s 109 (see para 155 ante), s 110 (see para 156 ante), s 111 (see para 157 ante) and s 113 (see para 159 ante).

3 'Relevant construction contract' means any construction contract other than one: (1) which specifies that the duration of the work is to be less than 45 days; or (2) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days: Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 3, Schedule Pt II para 12. 'Work' means any of the work or services mentioned in the Housing Grants, Construction and Regeneration Act 1996 s 104 (see para 9 ante): Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt II para 12.

4 Ibid Schedule Pt II para 1(a).

5 Ibid Schedule Pt II para 1(b).

6 Ibid Schedule Pt II para 1(c).

7 Ie *ibid* Schedule Pt II paras 2-4: see the text and notes 9-18 *infra*.

8 Ibid Schedule Pt II para 1.

9 'Relevant period' means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days: *ibid* Schedule Pt II para 12.

10 'Value of work' means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price: *ibid* Schedule Pt II para 12. 'Contract price' means the entire sum payable under the construction contract in respect of the work: Schedule Pt II para 12.

11 *Ibid* Schedule Pt II para 2(1), (2)(a).

12 *Ibid* Schedule Pt II para 2(1), (2)(b).

13 *Ibid* Schedule Pt II para 2(1), (2)(c).

14 *Ibid* Schedule Pt II para 2(1), (3).

15 *Ibid* Schedule Pt II para 2(4).

16 *Ie* *ibid* Schedule Pt II paras 4-7: see the text and notes 18-21 *infra*.

17 *Ibid* Schedule Pt II para 3.

18 *Ibid* Schedule Pt II para 4. 'Claim by the payee' means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated: Schedule Pt II para 12.

19 *Ibid* Schedule Pt II para 5.

20 *Ibid* Schedule Pt II para 6.

21 *Ibid* Schedule Pt II para 7.

22 *Ie* a payment of the kind mentioned in *ibid* Schedule Pt II paras 2, 5, 6 or 7: see the text and notes 9-15, 19-21 *supra*.

23 *Ibid* Schedule Pt II para 8.

24 *Ibid* Schedule Pt II para 9(a).

25 *Ibid* Schedule Pt II para 9(b).

26 *Ibid* Schedule Pt II para 9.

27 *Ie* under the Housing Grants, Construction and Regeneration Act 1996 s 111: see para 157 *ante*.

28 *Ie* not later than seven days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt II para 8 (see the text and notes 22-23 *supra*): Schedule Pt II para 10.

29 *Ibid* Schedule Pt II para 10.

30 *Ie* as mentioned in Housing Grants, Construction and Regeneration Act 1996 s 113: see para 159 *ante*.

31 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt II para 11. The scheme provides that Schedule Pt II paras 2, 4, 5, 7, 8, 9, 10 apply in the case of a relevant construction contract, and Schedule Pt II paras 6, 7, 8, 9, 10 apply in the case of any other construction contract: Schedule Pt II para 11.

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(v) Value Added Tax

161. In general.

The full application of value added tax to supplies under building contracts is outside the scope of this title¹, and a summary of the position only is provided here². Within the construction industry payment of value added tax by contractors, sub-contractors and sub-sub-contractors on goods and services used by those persons during the course of the project can be reclaimed as part of the 'inputs' during the relevant accounting period³. However, not all goods and services are subject to tax or are standard rated.

Once a contractor issues an invoice for value added tax he becomes liable to account to the Commissioners of Customs and Excise⁴ for that tax⁵. The tax point in relation to zero-rated supplies⁶ is when payment is received, not when an invoice is issued.

1 As to value added tax generally see VALUE ADDED TAX.

2 See para 162 et seq post.

3 See the Value Added Tax Act 1994 ss 24, 25; and VALUE ADDED TAX vol 49(1) (2005 Reissue) paras 215-216.

4 As to the Commissioners of Customs and Excise see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) para 900 et seq.

5 Any delay in the invoice being paid will result in cash flow difficulties owing to this early accounting of money that the contractor has not yet received. Delay in cash flow can be avoided by the contractor if when submitting invoices to the architect for certification he ensures that a value added tax invoice is not issued. This is done by marking the invoice with the words 'This is not a VAT invoice', or a similar formula.

6 As to zero-rated supplies see VALUE ADDED TAX vol 49(1) (2005 Reissue) para 174 et seq.

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162. Domestic buildings and zero rating.

Some categories of goods and services in the construction industry are either 'zero-rated'¹ for or 'exempt' from value added tax. The following items are zero-rated²:

- 59 (1) the grant of a freehold or lease for a term certain exceeding 21 years³ of, or the supply of services⁴ or building materials⁵ in the course of construction of: (a) domestic buildings or dwellings; (b) buildings to be used for certain communal residential purposes; or (c) buildings to be used by charities for non-business purposes⁶;
- 60 (2) approved alterations to listed buildings in heads (1)(a), (1)(b) and (1)(c) above⁷;

1 As to zero-rated supplies see VALUE ADDED TAX vol 49(1) (2005 Reissue) para 174 et seq.

2 See the Value Added Tax Act 1994 s 30 (as amended), s 96(1) (as amended), Sch 8 Pt II group 5 (as substituted and amended); and VALUE ADDED TAX.

3 See the definition of 'major interest' in ibid s 96(1). 'Grant' includes an assignment or surrender: see Sch 8 Pt II group 5 (as substituted and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 179.

4 The services of an architect, surveyor or any person acting as consultant or in a supervisory capacity are excluded: see ibid Sch 8 Pt II group 5 item 2 (as substituted and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 179.

5 In relation to the supply of materials, the supplier must be a person making a supply of services as described in ibid Sch 8 Pt II group 5 item 2 or Sch 8 Pt II group 5 item 3 in relation to a building within head (1) (a), (1)(b) or (1)(c), or head (2) in the text: see Sch 8 Pt II group 5 item 4 (as substituted); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 179.

6 See ibid Sch 8 Pt II group 5 (as substituted and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 179.

7 See ibid Sch 8 Pt II group 6 (as substituted and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 181. For the meaning of 'approved alterations' see Sch 8 Pt II group 6 note (6) (as substituted and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 181.

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163. Commercial buildings and standard rating.

The freehold sales of 'new' commercial buildings are standard rated¹. The general rule is that a building is 'new' if it was completed less than three years before the sale². A building completed before 1 April 1989 may still be 'new' but only if it was not fully occupied before that date and the relevant sale is the first such sale taking place after that date³. The freehold sale of 'old' commercial buildings is exempt from value added tax⁴. All grants of leases and assignments of leases of commercial property are exempt from value added tax⁵ but the surrender of leases is standard rated⁶.

1 The Value Added Tax Act 1994 s 31, Sch 9 (as amended) provides for supplies which are exempt from value added tax. In relation to land and buildings see Sch 9 Pt II group 1 (as amended). See further VALUE ADDED TAX vol 49(1) (2005 Reissue) para 156.

2 See *ibid* Sch 9 Pt II group 1 note (4); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 156.

3 See *ibid* Sch 9 Pt II group 1 notes (5), (6); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 156.

4 *Ibid* Sch 9 Pt II group 1 item 1(a) refers only to incomplete or new buildings. A building is complete when an architect issues a certificate of practical completion (see paras 64, 125 *ante*) or it is first fully occupied, whichever happens first: see Sch 9 Pt II group 1 note (2); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 156.

5 *Ie* they are not excluded from the exemption provided by *ibid* Sch 9 Pt II group 1.

6 See *ibid* Sch 9 Pt II group 1 note (1) (as substituted); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 156.

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164. Exemptions and the election to waive.

The differences between zero-rating and exemption are complicated¹. In general a person making zero-rated supplies makes them taxable at 0 per cent, and therefore need not increase the purchase price to cover value added tax charges. A person providing zero-rated supplies can reclaim input tax on purchases (if registered). However, a person providing exempt supplies cannot reclaim input tax on business purchases because input tax is only deductible if it is attributable to a taxable supply. A person making exempt supplies therefore bears the burden of these 'inputs'².

The effect of this may be offset since a landowner or developer who sells, and a landlord who leases, land or a commercial building, by exercising the election to waive exemption³, can convert the exempt supply into a standard rated supply. Thereby input tax attributable to that supply or sale will usually be recoverable. The election to waive exemption is subject to many procedural and technical conditions⁴.

1 The Value Added Tax Act 1994 s 31, Sch 9 (as amended) (see VALUE ADDED TAX vol 49(1) (2005 Reissue) para 156) lists the supplies which are exempt. As to exemptions and zero rating see VALUE ADDED TAX vol 49(1) (2005 Reissue) para 155 et seq.

2 See generally VALUE ADDED TAX.

3 See the Value Added Tax Act 1994 s 51, Sch 10 para 2 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 157.

4 See ibid Sch 10 para 3 (as amended), Sch 10 para 3A (as added and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 157 et seq. Banks, building societies, and insurance companies are not capable of registering for value added tax; therefore such an entity will probably establish a wholly-owned subsidiary in order to reclaim any tax which it pays in the course of construction.

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165. Self supply charge.

Commercial property dealings and construction work may be subject to an artificial self supply charge, when a developer is treated as making a taxable supply to and by himself¹. This charge is incurred for example when a person undertakes building work in-house by using his own labour force (if the cost of the labour would usually be standard rated). If a person builds a new building that benefits from a zero rating which changes to commercial usage within 10 years a self supply charge applies to recover the zero rating benefit previously obtained². The self-supply charge does not apply where the value of the services is less than £100,000³.

1 See the Value Added Tax Act 1994 s 51, Sch 10 paras 5, 6 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 34.

2 See ibid Sch 10 para 1(2)(b); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 180.

3 See ibid Sch 10 para 6(5); and VALUE ADDED TAX vol 49(1) (2005 Reissue) para 34.

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4. LIABILITIES, REMEDIES AND DISPUTES

(1) NEGLIGENCE AND OTHER LIABILITIES

(i) Liability to Third Parties

166. Negligence.

Ordinary principles of negligence apply where a person is injured or property damaged as a result of construction works¹. The contractor owes a duty of care to provide a safe means of access to the site². He also owes a duty to all lawful users of the property to carry out the work with proper care³. This duty is owed even where the contractor is also the vendor or lessor⁴ and is not abated by the subsequent disposal of the property⁵.

Generally there will be no liability for economic loss unless there is a special relationship of reliance or assumption of responsibility which gives rise to a duty not to cause such loss⁶ or the economic loss is consequent on physical damage⁷.

A tortious duty of care may be excluded⁸ or limited⁹ by the existence of a contractual relationship between the two parties or between one of the parties and a third party¹⁰. However, where the contract is for professional services the duty of care in tort will exist alongside the duties imposed by the contract¹¹. Such a parallel duty of care in tort may, it seems, exist even in relation to the provision of non-professional services¹².

An employer is not vicariously liable for the negligence of an independent contractor¹³.

Where a party suffers damage which is caused partly as a result of his own fault and partly as a result of another's failure to take reasonable care and skill the court or arbitrator may reduce the amount of damages awarded to the extent it is thought just and reasonable¹⁴.

Where two or more parties are responsible for causing the same damage one party may recover a contribution from the other parties¹⁵. The court will make an assessment of the amount of contribution it finds is just and equitable having regard to the extent of the person's responsibility for the damage in question¹⁶.

¹ Liability to third parties is outside the scope of this title, and this paragraph therefore only outlines some aspects. For further consideration of negligence and liability to third parties see NEGLIGENCE.

² *AC Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL.

³ *Gallagher v N McDowell Ltd* [1961] NI 26, CA; *Sharpe v ET Sweeting & Son Ltd* [1963] 2 All ER 455, [1963] 1 WLR 665.

⁴ *Dutton v Bognor Regis UDC* [1972] 1 QB 373 at 393-394, [1972] 1 All ER 462 at 471-472, CA, per Lord Denning MR, and at 401-402, and 478-479 per Sachs LJ (overruled on another point in *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL); and see the Defective Premises Act 1972 s 3 (see para 79 ante).

⁵ See *ibid* s 3; and para 79 ante.

⁶ For circumstances in which such a duty arises see eg *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465, [1963] 2 All ER 575, HL; *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758, [1988] 1 All ER 791, CA; *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL;

Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd [1989] QB 71, [1988] 2 All ER 971, 41 BLR 43, CA; *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 AC 499, [1990] 2 All ER 943, HL; *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113, [1991] 1 All ER 134, CA; *Preston v Torfaen Borough Council* (1993) 65 BLR 1, (1993) 36 ConLR 48, CA; *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 66 BLR 56, Can SC; *Henderson v Merrett Syndicates* [1995] 2 AC 145, [1994] 3 All ER 506, HL; *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL; *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, sub nom *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*, *The Nicholas H* [1995] 3 All ER 307, HL; *Williams v Natural Life Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL; and see NEGLIGENCE vol 78 (2010) PARA 13.

Physical damage caused to a building by negligent construction of that building is pure economic loss: *Murphy v Brentwood District Council* supra; *Department of the Environment v Thomas Bates and Son Ltd* supra. However, physical damage to one part of a building caused by the negligent design or construction of another part of the same building may exceptionally be recoverable by virtue of the 'complex structure' exception identified in *Murphy v Brentwood District Council* supra: see the dictum of Lord Keith of Kinkel at 470 and 922, of Lord Bridge of Harwich at 476-479 and 926-928, of Lord Oliver of Aylmerton at 484-485 and 932-933, and of Lord Jauncey of Tullichettle at 497 and 942; *Jacobs v Morton and Partners* (1994) 72 BLR 92; cf *Tesco Stores Ltd v Norman Hitchcox Partnership Ltd* (1997) 56 ConLR 42 at 168 per Judge Lewis QC; *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] BLR 97, CA. As to pure economic loss see NEGLIGENCE vol 78 (2010) PARA 13.

7 *SCM (United Kingdom) Ltd v WJ Whittall & Son Ltd* [1971] 1 QB 337, CA; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, [1972] 3 All ER 557, CA; *Muirhead v Industrial Tank Specialists Ltd* [1986] QB 507, [1985] 3 All ER 705, CA; *Londonwaste Ltd v Amec Civil Engineering Ltd* (1997) 83 BLR 136, (1997) 53 ConLR 66.

8 See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC; *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, 41 BLR 43, CA; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, [1991] 4 All ER 563, HL.

9 *William Hill Organisation Ltd v Bernard Sunley & Sons Ltd* (1982) 22 BLR 1, CA.

10 *Southern Water Authority v Carey* [1985] 2 All ER 1077, sub nom *Southern Water Authority v Lewis and Duvivier* (1984) 27 BLR 116; *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA; *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA; cf *National Trust for Places of Historic Interest or Natural Beauty v Haden Young Ltd* (1994) 72 BLR 1, CA; *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* [1999] 2 All ER 241, [1997] 1 WLR 9, HL. See also *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

11 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA (disapproving *Bagot v Stevens, Scanlan & Co* [1966] 1 QB 197, [1964] 3 All ER 577); *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554, [1978] 2 All ER 445, CA; *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384, [1978] 3 All ER 571; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, [1983] 1 All ER 65, HL; *Richard Roberts Holdings Ltd v Douglas Smith Stimson Partnership* (1988) 46 BLR 50; *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership (a firm)* [1993] 3 All ER 467, 65 BLR 21; *Henderson v Merrett Syndicates* [1995] 2 AC 145, [1994] 3 All ER 506, HL; *David Holt and Bernard Holt v Payne Skillington and De Groot Collis* (1995) 77 BLR 51, (1995) 140 Sol Jo LB 30, CA.

12 See *Barclays Bank plc v Fairclough Building Ltd (No 2)* (1995) 76 BLR 1, (1995) 44 ConLR 35.

13 See *Sharpe v ET Sweeting & Son Ltd* [1963] 2 All ER 455, [1963] 1 WLR 665; *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499, [1990] 2 All ER 943, HL; *Rowe v Herman* [1997] 1 WLR 1390, 58 ConLR 33, CA; and TORT vol 97 (2010) PARA 710.

14 See the Law Reform (Contributory Negligence) Act 1945 s 1 (as amended); and NEGLIGENCE vol 78 (2010) PARA 75 et seq. See *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA; *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, [1999] 1 All ER 833, HL.

15 See the Civil Liability (Contribution) Act 1978 s 1; and TORT vol 97 (2010) PARA 450 et seq. The Civil Liability (Contribution) Act 1978 applies to any damage whatever the basis of the liability. See generally TORT vol 97 (2010) PARA 449 et seq. See also *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85, [1995] 4 All ER 260, CA; *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1, [1996] 1 WLR 675, CA; *J Sainsbury plc v Broadway Malyan* (1998) 61 ConLR 31; *Jameson v Central Electricity Generating Board* [1998] QB 323, [1997] 4 All ER 38, CA (overruled on another point [2000] 1 AC 455, [1999] 1 All ER 193); *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendant)* [2002] UKHL 14, [2002] 2 All ER 801, [2002] 1 WLR 1397; *Rahman v Arearose Ltd* [2001] QB 351, [2000] 3 WLR 1184, CA; *Hawkins & Harrison (a firm) v Tyler* [2001] Lloyd's Rep PN 1, CA; *Eastgate Group Ltd v Lindsey*

Morden Group Inc [2001] EWCA Civ 1446, [2002] 1 WLR 642, [2002] Lloyd's Rep PN 11; *BICC Ltd v Parkman Consulting Engineers (a firm)* [2002] BLR 64, CA.

16 See the Civil Liability (Contribution) Act 1978 s 2; and TORT vol 97 (2010) PARA 453. The contribution may amount to an indemnity: see s 2(2). See generally TORT vol 97 (2010) PARA 453; and paras 191-192 post. See also *Saipem SpA and Conoco (UK) Ltd v Dredging VO₂ BV and Geosite Surveys Ltd, The Volvox Hollandia (No 2)* [1993] 2 Lloyd's Rep 315.

UPDATE

166 Negligence

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 6--See also *Samuel Payne v John Setchell Ltd* [2002] BLR 489 (no duty of care owed by designer where loss suffered was pure economic loss); and *Precis (521) plc v William M Mercer Ltd* [2005] EWCA Civ 114, [2005] All ER (D) 206 (Feb) (valuers did not assume responsibility to third party investors in relation to preparation of valuation report on company's pension fund).

NOTE 15--The test for establishing parties' liability for the same damage is whether one party's payment to the claimant would give rise to a mutual discharge of liabilities: *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services, H B Boring & Co (Pt 20 defendants)* [2002] EWCA Civ 1785, [2002] Lloyd's Rep IR 185.

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167. Liability as occupier.

The contractor may be in occupation of the site for the purposes of the Occupiers' Liability Act 1957¹ and, if he is, he will owe lawful visitors a duty to see that the premises are safe for the purpose of their visit² but, in discharging this duty, the contractor may rely on the visitor guarding against special risks ordinarily incident in the exercise of his calling³. A contractor who does not control the works is not in occupation of them⁴. During the execution of the works, an employer who retains control of the premises will be liable as an occupier to third parties⁵. Where damage is caused to a visitor by a danger arising from faulty execution of any work of construction, maintenance or repair, the employer will have a defence if he acted reasonably in entrusting the work to an independent contractor and took steps to satisfy himself that the contractor was competent and that the work had been properly done⁶.

Where the occupier is or should be aware that a trespasser may be in the vicinity of a danger on the site and it is a risk against which, in all the circumstances, the occupier should offer protection, he owes the trespasser a duty to see that he does not suffer death or personal injury by reason of that danger⁷.

1 See NEGLIGENCE vol 78 (2010) PARA 29 et seq.

2 *Fisher v CHT Ltd (No 2)* [1966] 2 QB 475, [1966] 1 All ER 88, CA; *Savory v Holland Hannen and Cubitts (Southern) Ltd* [1964] 3 All ER 18, [1964] 1 WLR 1158, CA; and see *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028 (damage to the property of an invitee).

3 See the Occupiers' Liability Act 1957 s 2(3)(b); and NEGLIGENCE vol 78 (2010) PARA 32. See also *Roles v Nathan* [1963] 2 All ER 908 at 912-914, [1963] 1 WLR 1117 at 1123-1125, CA, per Lord Denning MR.

4 *Kearney v Eric Waller Ltd* [1967] 1 QB 29, [1965] 3 All ER 352.

5 *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, HL; *Fisher v CHT Ltd (No 2)* [1966] 2 QB 475, [1966] 1 All ER 88, CA; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028.

6 See the Occupiers' Liability Act 1957 s 2(4)(b); and NEGLIGENCE vol 78 (2010) PARA 35. The burden of proof of this allegation is on the occupier: *Christmas v Blue Star Line Ltd and Harland and Wolff Ltd* [1961] 1 Lloyd's Rep 94.

7 See the Occupiers' Liability Act 1984 s 1 (as amended); and NEGLIGENCE vol 78 (2010) PARA 40. See also *Ratcliff v McConnell* [1999] 1 WLR 670, 143 Sol Jo LB 53, CA.

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168. Defective premises.

A person who takes on work in the provision of a dwelling, including the conversion of an existing building, is under a duty imposed by the Defective Premises Act 1972 to ensure that as regards that work the dwelling will be fit for habitation when completed. This is in addition to any duty otherwise owed¹.

¹ See the Defective Premises Act 1972 ss 1(1), 6(2). See further paras 77-79 ante; and NEGLIGENCE vol 78 (2010) PARAS 43-44. As to exclusions from the duty see para 78 ante.

UPDATE

168 Defective premises

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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169. Nuisance, trespass etc.

In addition to the liability in negligence of an owner or occupier of a building¹, further liabilities may be imposed in respect of nuisance, noise or trespass occurring during the carrying out of building or engineering works, or arising out of the effect of such works on adjoining land or highways².

1 See paras 77-79, 166-168 ante; and NEGLIGENCE vol 78 (2010) PARA 29 et seq.

2 See para 106 et seq ante; and NUISANCE vol 78 (2010) para 101 et seq; TORT vol 97 (2010) PARA 562 et seq.

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(ii) Duty of Care to Employees

170. General duty.

An employer of workmen owes his employees a general duty to provide competent staff¹, adequate materials², a proper system of work and effective supervision³. Many of these duties are further provided for by statute and regulations⁴. The duty cannot be delegated by entrusting its observance to a competent independent contractor⁵, but an employer who employs small firms of sub-contractors for building work may assume a duty to provide proper supervision towards the sub-contractors' employees⁶.

1 See *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348, [1957] 2 All ER 229; and EMPLOYMENT vol 39 (2009) PARA 33.

2 See EMPLOYMENT vol 39 (2009) PARA 33.

3 See *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628, HL; and EMPLOYMENT vol 39 (2009) PARA 33.

4 See para 171 post; and EMPLOYMENT vol 39 (2009) PARA 32 et seq; HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 412 et seq.

5 See *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906, [1987] 2 All ER 878, HL.

6 *McArdle v Andmac Roofing Co* [1967] 1 All ER 583, [1967] 1 WLR 356, CA; cf *Makepeace v Evans Bros (Reading) (a firm)* [2000] BLR 737, [2001] ICR 241, CA.

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171. Health and safety of workmen.

Every contractor and employer of workmen is under a statutory duty to comply with regulations requiring the provision of safe means of carrying out building operations and works of engineering construction¹.

The Health and Safety Executive² may grant a certificate exempting persons or premises or plant and equipment from requirements imposed by such regulations where it is satisfied that the health and safety of persons who are likely to be affected by the exemption will not be prejudiced in consequence³.

The principal matters covered by the regulations are provisions relating to scaffolds⁴, to first aid, ambulances and lavatory facilities⁵, to the supervision of safe conduct at work, the safety of working places and means of access, excavations, explosives, demolition and the fencing and safe use of machinery⁶.

Where defective equipment is supplied by an employer and his employee is injured in consequence of that defect which is attributable, wholly or in part, to a third party, the injury is deemed to be also attributable to the employer⁷.

1 See the Factories Act 1961 s 127 (as amended); the Health and Safety at Work etc Act 1974 s 15 (as amended); and HEALTH AND SAFETY AT WORK vol 52 (2009) PARAS 315, 424, 425. Pursuant to the Health and Safety at Work etc Act 1974 s 15 (as amended), the Construction (Health, Safety and Welfare) Regulations 1996, SI 1996/1592 (amended by SI 1998/494; SI 1998/2306; SI 1998/2307; and SI 1999/3242) have been made, which substantially revoke and replace previous regulations relating to health and safety in the construction industry. Other relevant regulations include the Construction (General Provisions) Regulations 1961, SI 1961/1580 (amended by SI 1966/94; SI 1974/1681; SI 1984/1593; SI 1988/1657; SI 1989/635; SI 1989/682; SI 1992/2793; SI 1992/2932; SI 1994/3140; SI 1995/2923; and SI 1996/1592); the Construction (Design and Management) Regulations 1994, SI 1994/3140 (amended by SI 1996/1592; SI 1998/494; SI 1999/3242; and SI 2000/2380); and the Provision and Use of Work Equipment Regulations 1998, SI 1998/2306 (amended by SI 1999/860; SI 1999/2001; and SI 2001/1701). There are other provisions which apply to particular types of work (eg the Shipbuilding and Ship-repairing Regulations 1960, SI 1960/1932 (as amended) (see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 716 et seq)), or to particular activities (eg the Manual Handling Operations Regulations 1992, SI 1992/2793 (see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 583)).

2 Is established under the Health and Safety at Work etc Act 1974 s 10 (as amended): see HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 361 et seq.

3 See the Construction (Health, Safety and Welfare) Regulations 1996, SI 1996/1592, reg 31.

4 See particularly *ibid* regs 6, 8, Schs 1, 2; and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 683 et seq. See also *Nixon v Chanceoption Developments Ltd* [2002] EWCA Civ 558, [2002] All ER (D) 14 (Apr), where it was held that where it was an incontestable fact that a defendant had been in breach of its statutory duty to ensure scaffolding could be safely used, the defendant would be liable in damages to a claimant who had fallen from the scaffolding.

5 See particularly the Construction (Health, Safety and Welfare) Regulations 1996, SI 1996/1592, reg 20 (as amended), reg 22, Sch 6; and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 567 et seq.

6 See particularly *ibid* regs 5-21 (as amended); and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 683 et seq.

7 See the Employer's Liability (Defective Equipment) Act 1969 s 1. See also para 166 ante; and EMPLOYMENT; NEGLIGENCE.

UPDATE

171 Health and safety of workmen

TEXT AND NOTES--SI 1996/1592 replaced: Construction (Design and Management) Regulations 2007, SI 2007/320.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--SI 1961/1580 revoked, SI 1994/3140 replaced: SI 2007/320. SI 1998/2306 further amended: SI 2005/735, SI 2007/320, SI 2008/1597.

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(2) REMEDIES

(i) Damages for Breach or Repudiation of Contract

172. Employer's right to damages.

In general¹ an employer's claim will be for breach of the contractor's single obligation to complete the works in accordance with the contract². An employer may also be able to recover damages for breaches which occur earlier than completion³. An employer's common law right to damages for breach of contract is not removed because of his failure to notify the contractor of defects within the time limit specified in the contract, although this failure may limit the amount of damages recoverable⁴.

If the contractor wholly fails to complete the work the measure of damages is the additional cost of completing the works beyond that which would have been payable or paid to the contractor⁵. Similarly if the contractor fails to complete part of the works or purports to complete it but with defective work or materials the damage recoverable is the diminution in value, measured normally by the cost of completing or putting right the work⁶.

Usually the employer will have executed the work of reinstatement and the actual costs will be known but the estimated cost may be recovered and, provided it is reasonable, will be the measure of damages. The estimated cost of work not yet executed may be recovered provided that the work is reasonable and the employer genuinely intends to execute it⁷. The cost of reinstatement will be reasonable even if the work produces a better building and no allowance or deduction is generally made on account of betterment⁸. Reinstatement involves producing 'new for old' and as such may inevitably lead to work of a higher standard being required, for example by the provisions relating to building regulation⁹. If, however, a claimant chooses to build to a higher standard than is strictly necessary there will be a deduction in respect of betterment¹⁰. It is not always necessary for the employer to prove that he has paid or will himself pay for the work¹¹.

Where the employer has no intention of carrying out works of completion or reinstatement¹² or the cost of such works is out of all proportion to the benefit to be obtained¹³, the appropriate measure of damages is the diminution in the value of the property occasioned by the breach. This may result in some cases in a nominal award of damages¹⁴.

1 As to the right to recover damages for breach of contract generally see CONTRACT vol 9(1) (Reissue) para 1012; DAMAGES vol 12(1) (Reissue) para 941 et seq.

2 This would logically include claims both for defective work and for failure to complete on time. However, there may be separate causes of action arising from such a breach: see *Idyll v Dineman Davidson* (1985) 4 Const LJ 294, CA; *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* (1986) 33 BLR 77, CA (sed quaere).

3 See *Lintest Builders v Roberts* (1980) 13 BLR 38, CA; *Surrey Heath Borough Council v Lovell Construction Ltd* (1988) 42 BLR 25 at 34 per Judge Fox-Andrews QC (revsd on other grounds (1990) 48 BLR 108, CA); *Guinness plc v CMD Property Developments Ltd* (1995) 76 BLR 40, (1995) 46 ConLR 48; *Oval (717) Ltd v Aegon Insurance Co (UK) Ltd* (1997) 85 BLR 97, 54 ConLR 74; cf *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121 at 138-139, [1972] 1 WLR 146 at 165, HL, per Lord Diplock.

4 See *Pearce and High Ltd v Baxter* [1999] BLR 101, 66 ConLR 110, CA.

5 *Mertens v Home Freehold* [1921] 2 KB 526, CA; *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262. See also *DO Ferguson & Associates v M Sohl* (1992) 62 BLR 95, CA.

This measure of damages is not applicable where the contract is an entire contract and substantial completion has not been achieved; in such a case the employer, in his claim for damages, must, if the contractor has not deliberately been in breach, give credit for work done: see *Hoening v Isaacs* [1952] 2 All ER 176, CA. If, however, the contractor abandons the work or fails to complete it by his own default, the employer may recover damages equalling, or even exceeding, the amount of any instalments paid, on the basis of a total failure of consideration: *Appleby v Myers* (1867) LR 2 CP 651; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC.

6 *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL; *William Cory & Son Ltd v Wingate Investments (London Colney) Ltd* (1978) 17 BLR 104, CA; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, 13 BLR 45, CA; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

7 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, 13 BLR 45, CA; *Imodco v George Wimpey & Co Ltd and Taylor Woodrow Construction plc* (1987) 40 BLR 1, CA; cf *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; *Freeman v Niroomand* (1996) 52 ConLR 116, CA.

8 *Hollebone v Midhurst and Fenhurst Builders Ltd and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38; *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA (overruled on another point by *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL); *Barclays Bank plc v Fairclough Building Ltd (No 2)* (1994) 39 ConLR 144.

9 As to building regulation see BUILDING.

10 *Richard Roberts (Holdings) Ltd v Douglas Smith Stimson Partnership* (1988) 46 BLR 50 at 69 per Judge Newey QC.

11 *Jones v Stroud District Council* [1988] 1 All ER 5, [1986] 1 WLR 1141, CA; *Design 5 v Kenniston Housing Association* (1986) 34 BLR 92; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA.

12 *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129; *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784, [1977] 1 WLR 659; *Radford v De Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Ward v Cannock Chase District Council* [1986] Ch 546, [1985] 3 All ER 537; *Hussey v Eels* [1990] 2 QB 227, [1990] 1 All ER 449, CA; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

13 *Applegate v Moss* [1971] 1 QB 406, [1971] 1 All ER 747, CA; *King v Victor Parsons & Co* [1972] 2 All ER 625, [1972] 1 WLR 801 (affd [1973] 1 All ER 206, [1973] 1 WLR 29, CA); *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, 13 BLR 45, CA; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

14 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

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173. Contractor's right to damages.

Where the employer repudiates the contract and no work at all has been carried out the measure of damages will be: (1) the contract price less the costs which the contractor would have had to bear in completing the work; or (2) any sums already expended subject to the employer's showing that had the contract been performed in full the contractor would still have made a loss¹.

Where the employer repudiates the contract after the work has been partially performed, and the contractor is unable to sue under the contract for the price of the work done, the damages will generally be measured as the loss of profits on the unfinished balance, plus the value of the work done at contract rates. The employer is entitled to abatement of the contractual price if the incomplete work is defective². There is some authority for the proposition that the contractor may, in the alternative, opt to claim a quantum meruit for the value of any work done³, however it is more likely that the contractor has no such entitlement⁴.

If the employer's breach is not repudiatory and does not prevent completion of the works, the damages recoverable by the contractor will be the increase in the cost of completing the works caused by reason of the breach, plus any profits that would have been made on such expenditure⁵.

Where the employer's conduct causes delay or disruption, the contractor is similarly entitled to the extra cost which he would not have incurred but for the delay or disruption⁶.

1 This represents the measurement of damages by the application of the ordinary principles of loss of profit and wasted expenditure: see *C and P Haulage (a firm) v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298; and DAMAGES vol 12(1) (Reissue) para 941 et seq.

2 *Slater v CA Duquemin Ltd* (1992) 29 ConLR 24.

3 See eg *Lodder v Slowey* [1904] AC 442, PC; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 33 ConLR 72 at 128-130, NSW CA, per Meagher JA. Quaere whether the contract price limits the amount that may be recovered on a quantum meruit. As to quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

4 See para 123 ante.

5 This is measured as loss of profit on ordinary principles: see DAMAGES.

6 *Lawson v Wallasey Local Board* (1883) 48 LT 507, CA. See further para 69 ante.

UPDATE

173 Contractor's right to damages

NOTE 5--See *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All ER 180; *Siemens Building Technology FE Ltd v Supershield Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349, [2010] All ER (D) 113 (Jan).

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174. Amount of damages where costs are unquantifiable.

The complexity of construction work sometimes makes it difficult to establish clearly how an undoubted actual loss was caused. A claim must nevertheless be set out with sufficient particularity and specify a discernible nexus between the wrong and its consequences¹. Provided that such a nexus has been established, then where the full extra costs depend on a complex interaction between the consequences of various events so that it is difficult to make an accurate apportionment of the total extra costs, an individual award may be made for such primary costs as can be proved to flow from the relevant event or events and a supplementary award in respect of the remainder as a composite whole².

1 *Wharf Properties Ltd v Eric Cumine Associates (No 2)* (1991) 52 BLR 1 at 20-21, PC; *McAlpine Humberoak Ltd v McDermott International Inc* (1992) 58 BLR 1 at 28, (1992) 28 ConLR 76 at 100-101, CA, per Lloyd LJ; *Mid-Glamorgan County Council v J Devonald Williams* (1992) 29 ConLR 129, (1991) CILL 722; *ICI plc v Bovis Construction Ltd* (1992) 32 ConLR 90, (1992) CILL 776; *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39; *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd* (1996) 82 BLR 81, Vic SC; cf *British Airways Pensions Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, (1994) 45 ConLR 1, CA; *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* (2002) Times, 10 July, Ct of Sess.

2 *Wharf Properties Ltd v Eric Cumine Associates (No 2)* (1991) 52 BLR 1 at 20-21, PC; explaining *Crosby v Portland UDC* (1967) 5 BLR 121; and *Merton London Borough Council v Leach* (1985) 32 BLR 51.

UPDATE

174 Amount of damages where costs are unquantifiable

NOTE 1--*John Doyle Construction Ltd*, cited, affirmed: *Laing Management (Scotland) Ltd v John Doyle Construction Ltd* [2004] BLR 295, IH.

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(ii) Specific Relief

175. Claims under contracts.

The principal contracts for construction work now contain extensive provisions whereby amounts may be recovered under the contract in respect of events which might or might not otherwise have been breaches of contract¹. Such amounts are generally assessed as if they were damages. It is a matter of the interpretation of each contract whether such provisions are supplementary to or in lieu of a right to recover damages². However, the distinction between claims under or for breach of contract is to be carefully observed³. Claims under contracts are sometimes assessed by the use of conventional approaches⁴ but these should not be used where the actual loss could be proved⁵.

1 Sometimes referred to as 'loss or expense' claims after the language used in the JCT forms. As to JCT standard forms of contract see para 2 ante.

2 See para 145 ante.

3 See *McAlpine Humberoak Ltd v McDermott International Inc* (1992) 58 BLR 1, (1992) 28 ConLR 76, CA.

4 Such as the so-called 'Hudson formula' (see Hudson's Building Contracts (10th Edn) 599), applied in *Ellis-Don Ltd v Parking Authority of Toronto* (1978) 28 BLR 98, Ont SC; and *JF Finnegan Ltd v Sheffield City Council* (1988) 43 BLR 124 at 136 per Sir William Stabb QC, but without regard to its assumptions and difficulties.

5 *Tate & Lyle Food and Distribution Ltd v GLC* [1981] 3 All ER 716 at 721, [1982] 1 WLR 149 at 152 per Forbes J; revsd on other grounds [1982] 2 All ER 854, [1982] 1 WLR 971, CA; decision of CA itself revsd [1983] 2 AC 509, [1983] 1 All ER 1159, HL. For an example of the court's approach to proof of loss see *Property and Land Contractors Ltd v Alfred McAlpine Homes North Ltd* (1995) 76 BLR 59, (1995) 47 ConLR 74.

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176. Recovery of money.

The contractor can apply for summary judgment for any sum due to him as the price of the work he has completed so long as there is no defence to the claim. Claims for liquidated sums, such as claims for the price of a lump sum contract, or for an instalment payment when the price is payable by instalments, are all within the provisions of the Civil Procedure Rules as to obtaining summary judgment¹.

Many building contracts provide that the contractor must present the certificate of an architect or valuer to the employer as a precondition of payment. In such a case the contractor cannot generally recover any sum without a certificate². In certain circumstances, however, the contractor is able to recover without a certificate³. Where the employer is given time within which he must honour a certificate, no claim can be made until that period has expired; although from the date when the certificate is presented there may be a debt albeit payable in the future⁴.

1 See CPR Pt 24; and CIVIL PROCEDURE vol 11 (2009) PARA 524 et seq. Note, however, that where the contract contains an arbitration clause, an application for summary judgment will generally be stayed to arbitration even where there is no defence to the claim: see the Arbitration Act 1996 s 9(4); and ARBITRATION vol 2 (2008) PARA 1222.

2 See *Dunlop and Ranken Ltd v Hendall Steel Structures Ltd (Pitchers Ltd, garnishees)* [1957] 3 All ER 344, [1957] 1 WLR 1102, DC. Cases where the courts have held that a certificate is a condition precedent to payment include: *Milner v Field* (1850) 5 Exch 829; *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597; *Wallace v Brandon and Byshottles UDC* (1903) 2 Hudson's BC (4th Edn) 362, CA; *Eaglesham v McMaster* [1920] 2 KB 169; *Lubenham Fidelity and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 39, (1986) 6 ConLR 85, CA. See para 125 et seq ante.

3 See paras 135-143 ante.

4 *Dunlop and Ranken Ltd v Hendall Steel Structures Ltd (Pitchers Ltd, garnishees)* [1957] 3 All ER 344 at 346, [1957] 1 WLR 1102 at 1104, DC, per Lord Goddard CJ.

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177. Opening up, reviewing and revising certificates.

Where a certificate has the effect of affecting the substantive rights of the parties to the building contract, for example by fixing the value of a variation¹ or determining an extension of time², the court has inherent jurisdiction to open up, review and revise the certificate³ (unless it is the intention of the contract that such certificates are to be of final and conclusive effect⁴) so as to determine the rights and liabilities of the parties. In relation to construction contracts⁵, an adjudicator acting under the statutory adjudication regime under the Housing Grants, Construction and Regeneration Act 1996⁶ has similar jurisdiction to determine the rights and obligations of the parties. Depending upon the terms of the arbitration clause in question the arbitrator may have similar powers and will certainly have such powers if the contract expressly empowers him to open up, review and revise certificates⁷.

1 See paras 146-147 ante.

2 See para 69 et seq ante.

3 *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd* [1999] 1 AC 266, [1998] 2 All ER 778, HL.

4 See para 134 ante.

5 I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

6 See *ibid* s 108; and para 207 post.

7 See paras 142-143 ante.

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178. Specific performance.

The court does not normally order specific performance¹ of an ordinary building or engineering contract². However, there are exceptions³, and an order for specific performance of a contract to build will be made if the following conditions are fulfilled: (1) that the building work is sufficiently defined by the contract between the parties; (2) that the claimant has a substantial interest in the performance of the contract that cannot be adequately compensated in damages; (3) that the defendant is in possession of the land on which the work is contracted to be done⁴.

1 As to orders of specific performance see SPECIFIC PERFORMANCE

2 This is because the court cannot supervise performance of the details of a building contract, particularly where the object or specification is not clearly defined in the contract, and because damages are an adequate remedy: see *Lucas v Commerford* (1790) 3 Bro CC 166 per Lord Thurlow LC; *Mosely v Virgin* (1796) 3 Ves 184; *South Wales Rly Co v Wythes* (1854) 5 De GM & G 880, CA; *Greenhill v Isle of Wight (Newport Junction) Rly Co* (1871) 23 LT 885; *Wilkinson v Clements* (1872) 8 Ch App 96; cf *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL.

3 *Wolverhampton Corp v Emmons* [1901] 1 KB 515, CA. Cf *Mosely v Virgin* (1796) 3 Ves 184.

4 *Molyneux v Richard* [1906] 1 Ch 34; *Carpenters Estates Ltd v Davies* [1940] Ch 160, [1940] 1 All ER 13; *Hepburn v Leather* (1884) 50 LT 660; *Cubitt v Smith* (1864) 11 LT 298; *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA; *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326 per Megarry J (as to which see also para 102 ante).

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179. Injunction and inquiry.

Injunctions are an equitable remedy, and will be granted only if the claimant's remedies at law are inadequate¹.

An injunction is not normally granted to prevent breach of the terms of a contract. Thus, as a general rule, the court will not restrain the employer even from wrongfully exercising the power of forfeiture, as the contractor can be compensated in damages for any loss he may sustain by reason of the forfeiture².

The court will not force the employer to employ a person to whom he objects, whether reasonably or unreasonably, to perform the works³. Such relief would be analogous to specific performance⁴. In an exceptional case where there was an arbitration clause by which the validity of the determination of the engineer, on which the right to forfeit was based, might be questioned, an interim injunction pending the arbitration was granted⁵.

The employer, however, on proper grounds, and on giving the usual undertaking in damages⁶, may obtain an injunction restraining the contractor from proceeding with the works⁷.

In a case where the employer has wrongfully exercised his power of forfeiture, there may be an inquiry as to what sums have been properly expended by the employer in completing the work since he took possession for the purpose of ascertaining the damages sustained by the contractor⁸.

1 See further 5; DAMAGES.

2 See para 120 ante.

3 *Garrett v Banstead Downs and Epsom Downs Rly Co* (1864) 12 LT 654 per Knight Bruce LJ; and see SPECIFIC PERFORMANCE.

4 *Munro v Wivenhoe and Brightlingsea Rly Co* (1865) 12 LT 655 at 657 per Knight Bruce LJ.

5 *Foster and Dicksee v Hastings Corpn* (1903) 87 LT 736 (but this case might not now be decided in the same way; see para 102 note 7 ante).

6 See CIVIL PROCEDURE vol 11 (2009) PARA 419.

7 *Cork Corpn v Rooney* (1881) 7 LR Ir 191. See, however, *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 268-270, [1970] 3 All ER 326 at 355-356, where Megarry J refused to grant an interim injunction after the employer purported to determine the building contract for failure to proceed diligently with the work and after the contractor had refused to leave the site: '... [B]efore granting a mandatory injunction on motion the court must feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted ... [T]he borough has established some sort of a case for having validly determined the contract [but] that case falls considerably short of any standard upon which, in my judgment, it would be safe to grant this injunction on motion'. See, however, para 102 note 7 ante.

8 See the form of inquiry directed in *Macintosh v Great Western Rly Co* (1863) 1 De GJ & Sm 443. See also para 123 ante.

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180. Rectification and rescission.

The same principles apply in determining whether either party to a building contract can avail himself of the remedies of rectification or rescission as apply to all contracts¹. If the contract fails to express the common intent of the parties, for example as the result of a clerical error, the court will rectify the contract to conform to that intent². A contract will also be rectified if one party enters into it believing it to contain a particular term, and the other party knows of that belief and also that the term is omitted³. A party cannot obtain rectification where, by his conduct, he appears to have affirmed the contract in its defective form⁴.

1 See generally CONTRACT vol 9(1) (Reissue) paras 896, 986 et seq; EQUITY.

2 For the operation of rectification in building cases see *Simpson v Metcalf* (1854) 24 LTOS 139; *Neill v Midland Rly Co* (1869) 17 WR 871; *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, [1971] 1 WLR 1390n; *Carlton Contractors v Bexley Corp'n* (1962) 60 LGR 331.

3 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545.

4 See *Page v Taunton UDC* (1904) Hudson's BC (7th Edn) 126; *Ewing and Lawson v Hanbury & Co* (1900) 16 TLR 140.

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181. Misrepresentation.

A party to a building contract may rescind the contract for fraudulent¹, negligent or innocent misrepresentation². Also, the court may award damages for negligent misrepresentation; and, in the case of a misrepresentation made otherwise than negligently, the court may award damages in lieu of rescinding the contract if it would be equitable to do so³.

1 See para 29 ante; and generally MISREPRESENTATION AND FRAUD.

2 See the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 701 et seq.

3 See *ibid* s 2; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 834. See also *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; *Smith New Court Securities v Citibank NA* [1997] AC 254, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, HL; *Floods of Queensferry Ltd v Shand Construction Ltd* [2000] BLR 81; and see para 29 ante.

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182. Set-off.

The parties to a building contract, as with any other contract, may agree by the words of their contract to preclude a party to it from exercising his rights of set-off and counterclaim¹, but there is no general principle that an architect's certificate must be honoured in full without the right to exercise the power to set off and counterclaim or to apply for a stay of proceedings pending recourse to arbitration where there is an arbitration clause². A set-off proper should be distinguished from the right to have the price abated by reason of a breach of contract which made the subject matter of the contract less³. There is a presumption that a building contract does not disentitle a party to the remedies that would arise by operation of law, including the rights of abatement and set-off⁴, and if these remedies are to be excluded the contract must contain clear unequivocal words that such a remedy should not be available⁵. However, a party to a construction contract⁶ may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment⁷. It is thought that such a notice must be given in cases of set-off or abatement⁸.

¹ See generally CIVIL PROCEDURE vol 11 (2009) para 634 et seq; and *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA.

² *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL. See para 132 ante.

³ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL; *Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd* (1989) 47 BLR 55, CA; *CA Duquemin v Raymond Slater* (1993) 65 BLR 124; *Mellowes Archital Ltd v Bell Projects Ltd* (1997) 87 BLR 26, CA.

⁴ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 718, [1973] 3 All ER 195 at 215, HL, per Lord Diplock.

⁵ *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL. See also *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA.

⁶ I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

⁷ See *ibid* s 111; and para 157 ante.

⁸ *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187, 70 ConLR 51; *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158, [2000] All ER (D) 68.

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(iii) Restriction and Limitation of Actions

183. Exclusion of remedies.

The ordinary rules relating to all commercial contracts apply to building contracts in determining whether a provision has the effect of excluding or restricting the right or remedy that would otherwise be available¹. Some building contracts do, however, limit the right of the parties to question the subject matter of certificates unless a specific step is taken at or about the time when that certificate is issued². Such provisions are subject to the test of reasonableness in the Unfair Contract Terms Act 1977³ where one contracting party deals as a consumer or on the other's written terms of business⁴. However, once a certificate has acquired conclusive effect, the court will not exercise its powers to extend time for the commencement of an arbitration⁵ for the purpose of challenging such a certificate⁶.

1 See generally CONTRACT.

2 See eg *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146.

3 *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115.

4 See the Unfair Contract Terms Act 1977 ss 3, 13; and CONTRACT vol 9(1) (Reissue) paras 823, 833.

5 See the Arbitration Act 1996 s 12; and ARBITRATION vol 2 (2008) PARA 1221.

6 *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 40 ConLR 36, CA; overruling *McLaughlin & Harvey plc v P & O Developments Ltd* (1991) 55 BLR 101.

UPDATE

183 Exclusion of remedies

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--See *Scottish & Newcastle plc v GD Construction (St Albans) Ltd* [2003] EWCA Civ 16, [2003] Lloyd's Rep IR 809 (requirement to take out insurance).

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184. Limitation.

Any claim founded on a building contract must be brought within six years from the date on which the cause of action accrued¹, unless the contract is made by deed, in which case the period is 12 years from the date on which the cause of action arose². The period of limitation does not begin to run if the right of action is based upon the fraud of or is deliberately concealed by the defendant³. In such cases the date from which any period of limitation is calculated is the date on which the claimant discovered the fraud or concealment or could with reasonable diligence have discovered it⁴. In building contract cases deliberate concealment has been extended to assist a claimant who has based a cause of action upon faulty foundations which were covered by the builder before the claimant or his agent could ascertain the defective work⁵. Any other wrongful act knowingly committed by the defendant without informing the claimant or his agent may amount to deliberate concealment⁶, such as the concealment of improper work by the contractor from the architect, engineer and clerk of works⁷. Thus a contractor who substituted a different type of facing brick for the kind stipulated in the contract and used them though he knew they were different and in some cases substandard in quality was guilty of deliberate concealment⁸. However, for the concept of fraudulent concealment to be applied, there must be more than the covering up of bad work in the due succession of building work; the conscience of the defendant must be affected so that it was unconscionable to proceed with the work so as to cover up the defect without putting it right⁹. Where a builder deliberately conceals defective work or behaves in any other way which constitutes deliberate concealment, that conduct may be imputed to the builder's employer since the builder is for this purpose the agent of the employer¹⁰.

In general the cause of action for defective work will arise at the time when the works as a whole are or ought to have been completed or, in the case where defective work ought to have been corrected, at a date when the work ought to have been done¹¹ (for example at the time when the instructions ought to have been complied with or the work attended to as maintenance work). In the case of a failure to complete on time the cause of action will arise at the date when the works ought to have been completed. In the case of a claim for payment the cause of action will arise when the price, instalment, or sum certified ought to have been paid. Normally the latest date, for example the date when the final certificate should have been issued or paid, will be the relevant date.

1 See the Limitation Act 1980 s 5; and LIMITATION PERIODS vol 68 (2008) PARA 956. The Latent Damage Act 1986 (see LIMITATION PERIODS vol 68 (2008) PARA 982) does not apply to claims in contract (*Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808; *Société Commerciale de Réassurance v ERAS* [1992] 2 All ER 82n, CA) and is therefore not considered here.

2 See the Limitation Act 1980 s 8; and LIMITATION PERIODS vol 68 (2008) PARA 953.

3 See *ibid* s 32 (as amended); and LIMITATION PERIODS vol 68 (2008) PARA 1220.

4 See *ibid* s 32 (as amended); LIMITATION PERIODS vol 68 (2008) PARA 1220 et seq; and *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102, [1995] 2 All ER 558, HL; *Brocklesby v Armitage & Guest (a firm)* [2001] 1 All ER 172, [2002] 1 WLR 598, CA; *Cave v Robinson, Jarvis & Rolf (a firm)* [2002] UKHL 18, [2002] 2 All ER 641, [2002] 2 WLR 1107.

5 *Applegate v Moss* [1971] 1 QB 406, [1971] 1 All ER 747, CA; *King v Victor Parsons & Co* [1973] 1 All ER 206, [1973] 1 WLR 29, CA.

6 In *King v Victor Parsons & Co* [1973] 1 All ER 206, [1973] 1 WLR 29, CA, it was held that there was no fraudulent concealment if the defendant committed a wrongful act which he did not know about but ought to have known about.

7 *Gray (Special Trustees of the London Hospital) v TP Bennett & Son* (1987) 43 BLR 63. As to the clerk of works see para 6 ante.

8 *Clark v Woor* [1965] 2 All ER 353, [1965] 1 WLR 650.

9 *William Hill Organisation Ltd v Bernard Sunley & Sons Ltd* (1982) 22 BLR 1, CA; *Kijowski v New Capital Properties Ltd* (1987) 15 ConLR 1; *British Steel plc v Wyvern Structures Ltd* (1996) 52 ConLR 67.

10 *Applegate v Moss* [1971] 1 QB 406, [1971] 1 All ER 747, CA; *King v Victor Parsons & Co* [1973] 1 All ER 206, [1973] 1 WLR 29, CA, where an estate agent was held liable to the purchaser of a house built to the estate agent's order on weak foundations.

11 *Bellway (South East) Ltd v Holley* (1984) 28 BLR 139; *Chelmsford District Council v Evers* (1983) 25 BLR 99.

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(3) BONDS, INSURANCE AND INDEMNITIES

(i) Bonds and Sureties

185. Bonds.

A bond is a document made by deed whereby a third party guarantees the fulfilment by the contractor of the contract¹. In contracts for construction work, bonds will often support payment or performance obligations². Most commonly, a performance bond is given whereby the bondsman promises to pay up to the amount of the bond if the contractor fails to perform his contract. It is a matter of construction³ whether this amounts to a default⁴ or 'on demand' bond⁵. In all cases such bonds are surety contracts. Thus, unless a bond expressly allows for variations in the terms of the underlying contract, the bondsman will be discharged if there is any variation in the terms of the contract for construction work relating to the time for payment or performance by the contractor or any material variation of any other term if made without the bondsman's consent⁶ or if there is a not insubstantial departure from a term of the principal contract embodied in the guarantee⁷. If an 'on demand' bond is called the court will not restrain payment unless there is prima facie evidence of fraud⁸. Liability under a default bond will only arise when the default provided for has occurred. This may require proof of the contractor's default (if not admitted)⁹ and the ascertainment of what is due to the employer¹⁰.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) para 89 et seq.

2 A guarantee for the repayment of an advance payment is not a performance guarantee: *Wardens etc of the Mercers' Company v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA.

3 See *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199, [1995] 3 All ER 737, HL.

4 For examples in use in the construction industry see *General Surety & Guarantee Co Ltd v Francis Parker* (1977) 6 BLR 16; *Tins Industrial Co v Kono Insurance* (1987) 42 BLR 110, HK CA; *Perar BV v General Surety & Guarantee Co Ltd* (1994) 66 BLR 72, (1994) 43 ConLR 110, CA; *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199, [1995] 3 All ER 737, HL.

5 *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1, [1936] 1 All ER 454, HL.

6 *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Umma Bank* [1978] QB 159, [1978] 1 All ER 976, CA; *Holme v Brunskill* (1877) 3 QBD 495, CA.

7 *National Westminster Bank plc v Riley* [1986] BCLC 268 at 275, CA, per May LJ; applied in *Wardens etc of the Mercers' Company v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA.

8 See eg *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA. As to the need for the call to conform to the precise requirements of the bond see *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496, 51 BLR 1, CA.

9 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862. But see *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19, CA.

10 See the cases cited in notes 3-9 supra; and *Nene Housing Society Ltd v National Westminster Bank Ltd* (1980) 16 BLR 22.

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186. Sureties in general.

A building or engineering contract may provide that a contractor should give sureties for the due performance of his obligations under the contract, and where a contractor does undertake to give sureties it is a question of construction whether the provision of sureties is a condition of the contract¹. Occasionally the employer will undertake to provide sureties to guarantee payment to the contractor².

The general principles governing the validity and enforcement of contracts of guarantee, the release of the sureties and the general obligations of the parties apply where a contract of guarantee is collateral to a building contract³. Difficulties can arise in relation to building contracts: (1) where the surety claims to be released by reason of the completion of the work⁴; (2) because of the conduct of the employer (as creditor under the guarantee)⁵; and (3) where there has been an alteration in the terms or extent of the contract⁶.

¹ *Roberts v Brett* (1865) 11 HL Cas 337; *State Trading Corp'n Ltd of India v Golodetz Ltd* [1989] 2 Lloyd's Rep 277, CA. See also *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1, SA SC.

² See eg *Andrews v Lawrence* (1865) 19 CBNS 768; *Oastler v Pound* (1863) 7 LT 852 (where a contractor obtained guarantors for payments falling due to a sub-contractor).

³ See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

⁴ See para 187 post.

⁵ See para 188 post.

⁶ See para 189 post.

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187. Discharge of surety on completion.

Generally a contract of guarantee is at an end when the guaranteed obligation has been fulfilled¹. Under many building contracts, however, the contractor's obligation to complete the work is not fulfilled until: (1) the work is complete in fact; and (2) the architect or engineer has issued a certificate² that the work has been completed to his satisfaction. A surety is not discharged where the works have only been substantially completed³. Where the contractor has in fact completed the work but the architect has not certified his satisfaction, the question whether the surety is released will depend on the construction of the contract of guarantee⁴. Where a certificate of satisfaction has been given, the surety will not be released if that certificate was obtained by the contractor improperly⁵.

1 See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 et seq.

2 As to certificates see paras 133-134 ante.

3 *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423, CA (where the contractor sued a guarantor of the employer, it was held that the surety's liability did not arise if the contractor could not show entire completion).

4 *Lewis v Hoare* (1881) 44 LT 66, HL.

5 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494, CA.

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188. Discharge by conduct of the creditor.

A contract of guarantee is not a contract uberrimae fidei¹; but where a surety guarantees the due performance of the contract by the contractor, it has been said that the surety must be made aware of anything which is abnormal in the contract between contractor and employer² and possibly the surety may be discharged by the non-disclosure of an unusual obligation in the building contract. A contractor's surety may also be discharged if the employer fails to comply with the terms of the contract of guarantee³; thus the surety will be discharged if the employer fails to insure the works⁴ or to give notice of the contractor's default⁵ if required by the terms of the guarantee. Further if the employer, without the consent of the surety, advances to the contractor by way of interim payment more than the contractor is entitled to, the surety will be discharged⁶, unless such advances were obtained by fraud⁷.

1 le a contract of the utmost good faith.

2 *Stiff v Eastbourne Local Board* (1869) 20 LT 339, CA, where the works were subject to the supervision of a third party's surveyor; and see *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL.

3 *Kingston-upon Hull Corpn v Harding* [1892] 2 QB 494 at 508, CA, per Bowen LJ.

4 *Watts v Shuttleworth* (1861) 7 H & N 353.

5 *Clydebank and District Water Trustees v Fidelity and Deposit Co of Maryland* 1916 SC (HL) 69.

6 *General Steam Navigation Co v Rolt* (1858) 6 CBNS 550 at 584; and see *Warre v Calvert* (1837) 7 Ad & El 143; *Calvert v London Dock Co* (1838) 7 LJCh 90.

7 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494, CA.

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189. Discharge by alteration in terms or extent of the contract.

The surety will be discharged by any alteration in the terms of the building contract made after the contract of guarantee was signed unless such alteration was clearly not prejudicial to the surety¹. A minor alteration made by the debtor for his advantage is not material², and a surety will not be released because a recital in a specification states erroneously that it has been signed when it is immaterial whether or not the specification was so signed³.

A surety may also be affected by a variation requiring the contractor to carry out additional work or the grant of an extension of time for completion⁴. Additional work will not, however, discharge the surety where the contract whose performance is guaranteed is drafted in terms which recognise the employer's (usual) power to require the contractor to carry out extra work, and the contractor's rights to extensions of time. An employer should insist on a guarantee which binds the surety to guarantee the contractor's performance of the building contract notwithstanding any variations which may be made under it; variations required by the employer which are outside the scope of the contract will release the surety from liability⁵.

1 *Andrews v Lawrence* (1865) 19 CBNS 768; *Holme v Brunskill* (1877) 3 QBD 495, CA; *Hoole UDC v Fidelity and Deposit Co of Maryland* [1916] 2 KB 568, CA; *Provident Accident and White Cross Insurance Co Ltd v Dahne and White* [1937] 2 All ER 255; *Wardens etc of the Mercers' Company v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA. See also para 185 ante.

2 *Andrews v Lawrence* (1865) 19 CBNS 768.

3 *Russell v Trickett* (1865) 13 LT 280.

4 *Harrison v Seymour* (1866) LR 1 CP 518; and see *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA.

5 See *Wren v Emmetts Contractors Pty Ltd* (1969) 43 AJLR 213, Aust HC.

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(ii) Insurance and Indemnities

190. Insurance requirements.

The standard forms of contract¹ contain provisions requiring the contractor to maintain insurance against injury to persons or property and in respect of damage to the works until, for example, the employer regains possession². Most employers³ are required by statute⁴ to maintain a policy of insurance against liability for bodily injury or disease sustained by their employees and arising out of or in the course of their employment in Great Britain; there is a penalty for failing to do so⁵.

1 As to standard forms of contract see para 2 ante. The ambit and interpretation of insurance provisions is outside the scope of this title; see generally INSURANCE. See, however, *Gold v Patman and Fotheringham Ltd* [1958] 2 All ER 497, [1958] 1 WLR 697, CA; *Higgs & Hill Building Ltd v University of London* (1983) 24 BLR 139; *Computer & Systems Engineering plc v John Lelliott (Ilford) Ltd* (1990) 54 BLR 1, CA; *Kruger Tissue (Industrial) Ltd v Frank Galliers Ltd* (1998) 57 ConLR 1; *Skanska Construction Ltd v Egger (Barony) Ltd* [2002] BLR 236, CA.

2 As to retaking possession of the works see *English Industrial Estates Corp v George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep 118, 7 BLR 122, CA.

3 Specified local authorities, nationalised industries, health service bodies (as defined in the National Health Service and Community Care Act 1990 s 60(7) (as amended) (see HEALTH SERVICES vol 54 (2008) PARA 94), and National Health Service trusts are exempted: see the Employers' Liability (Compulsory Insurance) Act 1969 s 3(1), (2) (as amended); and EMPLOYMENT vol 39 (2009) PARA 44. See further the Employers' Liability (Compulsory Insurance) Regulations 1998, SI 1998/2573 (amended by SI 1999/1820; and SI 2000/253); and EMPLOYMENT vol 39 (2009) PARA 40 et seq.

4 See the Employers' Liability (Compulsory Insurance) Act 1969; and EMPLOYMENT. For the limits of this obligation see *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212, CA.

5 The penalty on summary conviction is a fine not exceeding level 4 on the standard scale: Employers' Liability (Compulsory Insurance) Act 1969 s 5 (amended by virtue of the Criminal Justice Act 1982 ss 37, 46). Cf *Richardson v Pitt-Stanley* [1995] QB 123, [1995] 1 All ER 460, CA. As to the standard scale see para 99 note 14 ante.

UPDATE

190 Insurance requirements

NOTE 2--See *TFW Printers Ltd v Interserve Project Services Ltd* [2006] EWCA Civ 875, [2006] BLR 299 (obligation to insure ceased on practical completion of the works).

NOTE 3--SI 1998/2573 further amended: SI 2003/1615, SI 2004/2882, SI 2008/1765.

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191. Need for indemnity clauses.

A claim may be made against the employer for injury or damage arising by reason of the negligence or default of the contractor in carrying out the works¹. Consequently, standard form contracts frequently contain clauses requiring the contractor to indemnify the employer against such claims as well as to insure against them. Sometimes the employer will give a cross-indemnity to the contractor where the latter is liable by reason of the default of the employer².

¹ See *Richardson v Buckinghamshire County Council* (1971) 69 LGR 327, (1971) 6 BLR 58, CA. Where such injury or damage arises from a sub-contractor's failure to fulfil an express duty assigned to him under a specific term of his contract of employment, a general indemnity clause will not render the sub-contractor's employer liable: *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173, [2001] All ER (D) 59 (Feb). See generally FINANCIAL SERVICES AND INSTITUTIONS VOL 49 (2008) PARA 1013.

² As to standard forms of contract see para 2 ante.

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192. Construction of indemnity clauses.

An indemnity clause will not permit a party to recover loss caused by his own negligence¹ unless very clear words are used² or unless there is no other loss which the clause could be intended to cover³. Liability does not arise until the loss has been incurred⁴.

¹ *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789 at 815, [1968] 1 WLR 1028 at 1060 per Mocatta J; *Walters v Whessoe Ltd and Shell Refining Co Ltd* [1968] 2 All ER 816n, CA; *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *City of Manchester v Fram Gerrard Ltd* (1974) 6 BLR 70. See also *Caledonia North Sea Ltd v British Telecommunications plc* [2002] UKHL 4, [2002] BLR 139. See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013.

An indemnity clause in the main contract must be construed separately from any indemnity clause that is contained in a sub-contract entered into by the contractor: *Richardson v Buckinghamshire County Council* (1971) 69 LGR 327, (1971) 6 BLR 58, CA.

² See eg *AE Farr Ltd v Admiralty* [1953] 2 All ER 512, [1953] 1 WLR 965.

³ See eg *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; cf *EE Caledonia Ltd v Orbit Valve plc* [1995] 1 All ER 174, [1994] 1 WLR 1515, CA.

⁴ *County and District Properties Ltd v C Jenner & Son Ltd* [1976] 2 Lloyd's Rep 728; *R & H Green and Silley Weir Ltd v British Railways Board (Kavanagh, third party)* [1985] 1 All ER 237, [1985] 1 WLR 570n, 17 BLR 94.

UPDATE

192 Construction of indemnity clauses

TEXT AND NOTES--See *Tyco Fire and Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286, [2008] 2 All ER (Comm) 560 (contract not intended to give contractor liability insurance in respect of matters outside its own works).

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193. National House Building Council scheme.

A large number of contracts to build new homes incorporate the provisions of the National House Building Council ('NHBC') scheme, a typical system of insurance which gives the purchaser of a new house an alternative remedy against the NHBC in case of defects, and places certain obligations upon the house builder¹.

The scheme operates by compelling all builders registered under it to offer to the house buyer standard contract documents which include a limited insurance policy, and certain undertakings to remedy defects. The scheme provides for two periods: (1) an initial period of two years after completion, during which the builder is obliged to return to remedy defects notified to him by the beneficiary of the scheme; and (2) a further period of ten years in respect of serious structural defects, during which the beneficiary has the benefit of insurance from the NHBC². Further provisions provide limited insurance against bankruptcy or non-completion on the part of the house builder³.

¹ Compliance with the provisions of the scheme does not exempt a builder from compliance with the Defective Premises Act 1972 s 1 (see para 77 ante). The NHBC scheme is not an approved scheme for the purposes of s 2: see further para 78 ante.

² The failure to notify the early signs of a major defect does not restrict the remedy of the homeowner: *Marchant v Caswell and Redgrave Ltd and NHBC* (1976) 240 Estates Gazette 127. See also, for cases on the operation of the scheme, *Bellway (South East) Ltd v Holley* (1984) 28 BLR 139; *Kijowski v New Capital Properties Ltd* (1987) 15 ConLR 1.

³ Counter-indemnities may be provided: see *National House Building Council v Fraser* [1983] 1 All ER 1090, 22 BLR 43.

UPDATE

193 National House Building Council scheme

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(4) DISPUTES

(i) Litigation

194. In general.

Proceedings in respect of building or engineering contracts are generally commenced in the Queen's Bench Division of the High Court (or in the county court within the applicable jurisdictional limits)¹. Certain types of building or engineering contract claims, for example those related to the shipping or petrochemical industries (such as contracts for oil rigs or production platforms), are sometimes commenced and retained in the Commercial Court. However, all High Court claims concerning building contracts or professional negligence in the construction industry are, as a matter of general practice, now commenced as or liable to be transferred to be dealt with as, Technology and Construction Court claims ('TCC claims')². The Technology and Construction Court is part of the Queen's Bench Division³.

¹ As to the jurisdiction of the courts see COURTS vol 10 (Reissue) para 314 et seq. As to civil procedure generally see CIVIL PROCEDURE.

² See CPR 30.5(2); and CIVIL PROCEDURE vol 11 (2009) PARA 67. The Technology and Construction Court is a specialist list for the purpose of CPR 30: CPR 60.2(1). For the meaning of 'TCC claim' see para 195 note 1 post. As to TCC claims see para 195 post.

³ See the Queen's Bench Guide (QBG 1.5.3).

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195. Technology and Construction Court claims.

The majority of claims relating to building or engineering contracts are begun as Technology and Construction Court claims ('TCC claims')¹. Certain circuit judges, deputy circuit judges and recorders are nominated by the Lord Chancellor to deal with TCC claims². A claim will be allocated to a named TCC judge who will have the primary responsibility for the case management of the claim³ and should try the case⁴. Every claim allocated to the Technology and Construction Court will be allocated to the multi-track⁵. The provisions relating to the management of cases allocated to the multi-track⁶ apply to TCC claims except where they are inconsistent with the practice direction⁷ made in relation to such claims⁸. Directions will be given appropriate to the case and in conformity with the overriding objective of the Civil Procedure Rules⁹. These may involve the preparation of a schedule setting out the cases of the relevant parties¹⁰. Directions given by the Technology and Construction Court Judges are intended to enable a case to be tried with expedition and economy¹¹.

1 See Practice Direction--*Technology and Construction Court Claims* PD 60 para 2. 'TCC claim' means a claim which satisfies the requirements of CPR 60.1(3), and which has been issued in or transferred into the specialist list for such claims: CPR 60.1(2). A claim may be brought as a TCC claim if it involves issues or questions which are technically complex, or if a trial by a TCC judge is desirable: CPR 60.1(3). 'TCC judge' means any judge authorised to hear TCC claims: CPR 60.1(2)(c). As to the Technology and Construction Court see further CIVIL PROCEDURE vol 12 (2009) PARA 1546; COURTS vol 10 (Reissue) para 616.

2 See the Supreme Court Act 1981 s 68(1)(a) (amended by the Administration of Justice Act 1982 s 59).

3 See Practice Direction--*Technology and Construction Court Claims* PD 60 para 6. Applications should normally be made to the named judge: see para 7.

4 See Practice Direction--*Technology and Construction Court Claims* PD 60 para 11.

5 CPR 60.6.

6 Ie CPR 29: see CIVIL PROCEDURE vol 11 (2009) PARA 293 et seq.

7 Ie Practice Direction--*Technology and Construction Court Claims* PD 60.

8 CPR 60.6(2).

9 As to the provisions made in relation to case management conferences and pre-trial reviews see Practice Direction--*Technology and Construction Court Claims* PD 60 paras 8, 9. As to the overriding objective of the CPR see CIVIL PROCEDURE vol 11 (2009) PARA 33 et seq.

10 This is generally known as a 'Scott Schedule' (as it was devised by George Alexander Scott, an official referee from 1920-1933).

11 See further *Keating on Building Contracts* (7th Edn, 2001) pp 537-590.

UPDATE

195 Technology and Construction Court claims

TEXT AND NOTES--Except for orders made by the court of its own initiative and unless the court otherwise orders, every judgment or order made in claims proceeding in the TCC will be drawn up by the parties, and CPR 40.3 is modified accordingly: CPR 60.7(1)

(CPR 60.7 added by SI 2005/2292). An application for a consent order must include a draft of the proposed order signed on behalf of all the parties to whom it relates, and CPR 40.6 (consent judgments and orders) does not apply: CPR 60.7(2), (3) (as so added).

NOTE 2--Supreme Court Act 1981 s 68(1)(a) (now Senior Courts Act 1981 s 68(1)(a)) further amended: Constitutional Reform Act 2005 Sch 4 para 131(2).

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196. Powers of Technology and Construction Court Judges.

A Technology and Construction Court Judge has all the powers of a judge of the High Court¹. In particular, a Technology and Construction Court Judge has power to open up, review and revise interim certificates and the like so as to determine the rights of the parties². If all parties to an arbitration agreement agree a Technology and Construction Court Judge may exercise powers otherwise specific to the arbitrator³. A Technology and Construction Court Judge may also sit as an arbitrator⁴.

1 See CPR 60.

2 See *Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd* [1999] 1 AC 266, [1998] 2 All ER 778, HL.

3 See the Supreme Court Act 1981 s 43A (as added); and COURTS vol 10 (Reissue) para 608.

4 See the Arbitration Act 1996 s 93(1); and ARBITRATION vol 2 (2008) PARA 1226.

UPDATE

196 Powers of Technology and Construction Court Judges

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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197. Appeals.

Appeals from decisions of Technology and Construction Court Judges on fact and law (subject to certain limited exceptions¹) lie to the Court of Appeal. In almost all cases, permission to appeal is required from the Technology and Construction Court Judge or the Court of Appeal². The criteria for granting permission are the same as in any other High Court proceedings³.

1 See the Supreme Court Act 1981 s 18(1) (as amended). See further CIVIL PROCEDURE vol 12 (2009) PARA 1692; COURTS vol 10 (Reissue) para 616.

2 See CPR 52.3.

3 See CPR 52.3.

UPDATE

197 Appeals

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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198. Litigation and arbitration.

There may be proceedings arising out of the same contract and even about the same subject matter before both the court and an arbitrator¹. However, the court retains jurisdiction to restrain an arbitrator from deciding matters before the court². A court may also have powers not available to an arbitrator³.

1 *Lloyd v Wright* [1983] QB 1065, [1983] 2 All ER 969, CA.

2 *Northern Regional Health Authority v Derek Crouch Construction Ltd* [1984] QB 644 at 673, [1984] 2 All ER 175 at 191, CA, per Sir John Donaldson MR; *University of Reading v Miller Construction Ltd* (1994) 75 BLR 91, (1994) CILL 1011.

3 See para 143 ante; and ARBITRATION.

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(ii) Arbitration

199. Usual arbitration clauses.

It is very common to insert in building and engineering contracts a clause to the effect that, if a dispute arises between the contractor and the employer or his architect or engineer, it is to be referred to arbitration¹. The scope of such a clause depends upon its wording but it is to be applied in accordance with the general law of arbitration² and the provisions of the Arbitration Act 1996³.

The proceedings in the arbitration will usually be governed by the system of law of the place where the arbitration is held⁴. In particular, the provisions of the Arbitration Act 1996 apply where 'the seat of the arbitration'⁵ is in England and Wales or Northern Ireland⁶.

1 This part of the title deals with certain aspects of the law of arbitration only as it relates to building contracts. For a full discussion of the law see Mustill and Boyd *Commercial Arbitration* (2nd Edn, 1990). As to the law relating to arbitration see generally ARBITRATION vol 2 (2008) PARA 1201 et seq.

2 As to the construction and scope of arbitration agreements see ARBITRATION vol 2 (2008) PARA 1213 et seq. Note that claims relating to building contracts will generally be stayed in favour of arbitration under the Arbitration Act 1996 s 9(4) where there is a dispute and an applicable arbitration agreement. A stay may also be ordered even if the dispute cannot immediately be referred to arbitration: *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] QB 656, [1992] 2 All ER 609, CA; affd on different grounds [1993] AC 334, [1993] 1 All ER 664, HL.

3 The Arbitration Act 1996 substantially repealed and replaced the Arbitration Acts 1950-1979 with effect from 31 January 1997. For the purposes of the Arbitration Act 1996 Pt I (ss 1-84), the expression 'arbitration agreement' means, unless the context otherwise requires, a written agreement to submit present or future disputes to arbitration, whether an arbitrator is named therein or not: see s 5, 6; and ARBITRATION vol 2 (2008) PARA 1213. Oral arbitration agreements are governed by the common law and are not subject to what is now the Arbitration Act 1996, which applies only to arbitration based on written agreements (see *Imperial Metal Industries (Kynoch) Ltd v Amalgamated Union of Engineering Workers (Technical, Administrative and Supervisory Section)* [1979] 1 All ER 847, [1979] ICR 23, CA).

4 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 1 All ER 664, HL; and see ARBITRATION vol 2 (2008) PARAS 1206, 1207. As to the lex fori principle see CONFLICT OF LAWS vol 8(3) (Reissue) para 11.

5 For the meaning of 'the seat of the arbitration' see the Arbitration Act 1996 s 3; and ARBITRATION vol 2 (2008) PARA 1212.

6 See *ibid* s 2(1); and ARBITRATION vol 2 (2008) PARA 1209.

UPDATE

199 Usual arbitration clauses

NOTE 2--See *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, [2005] BLR 63.

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200. Application of arbitration clause.

Whether a particular dispute is within the scope of an arbitration clause depends in each particular case on the wording of the clause.

In the past, it was common practice for the architect or engineer under the contract to be appointed as arbitrator¹. Nowadays such an appointment is very unusual. Where the reference is to an independent arbitrator, an arbitration clause will generally be given a wide construction².

If the submission covers all disputes arising out of the contract, including disputes on questions of law, questions as to the true meaning and effect of the contract are thereby left to the arbitrator³; moreover such an arbitration clause will apply even if the contract has been repudiated by the party seeking to rely upon the arbitration clause⁴. The arbitration clause may be wide enough to enable an arbitrator to determine claims for rectification, misrepresentation or negligent misstatement⁵ and even fraudulent misrepresentation⁶. An arbitrator has power to determine allegations of fraud arising out of the execution of the contract⁷. Any question as to whether a contract was in fact entered into or was void for illegality or fraud⁸ may not, however, be covered by the arbitration clause⁹.

Unless otherwise agreed, the arbitrator may rule on his own substantive jurisdiction as to: (1) whether there is a valid arbitration agreement; (2) whether the tribunal is properly constituted; and (3) what matters have been submitted to arbitration in accordance with the arbitration agreement¹⁰.

1 Precise words were required to bring about this result. See eg *Northampton Gas Light Co v Parnell* (1855) 15 CB 630; *Tough v Dumbarton Water Works Comrs* (1872) 11 M 236, Ct of Sess; *Lawson v Wallasey Local Board* (1883) 48 LT 507, CA; and see para 203 post.

2 *Re Hohenzollern AG für Locomotivbahn and City of London Contract Corpn Ltd, and Common Law Procedure Act 1854* (1886) 2 TLR 470, CA; *Brodie v Cardiff Corpn* [1919] AC 337, HL. See also ARBITRATION.

3 *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314 at 327, HL, per Lord Parker. See also *Government of Gibraltar v Kenney* [1956] 2 QB 410, [1956] 3 All ER 22, where a claim for a quantum meruit and an alternative claim under the Law Reform (Frustrated Contracts) Act 1943 (see CONTRACT vol 9(1) (Reissue) para 913 et seq) both arose out of an agreement within the scope of the arbitration clause. As to quantum meruit see RESTITUTION vol 40(1) (2007 Reissue) para 113 et seq.

4 *Heyman v Darwins Ltd* [1942] AC 356, [1942] 1 All ER 337, HL; and see further ARBITRATION.

5 *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488, [1988] 2 All ER 577, CA.

6 *Government of Gibraltar v Kenney* [1956] 2 QB 410, [1956] 3 All ER 22. Where a contract includes comprehensive arbitration provisions, the circumstances in which the court may properly refuse an application to refer the matter to arbitration are strictly limited: *Strathmore Building Services v Greig* 2000 SLT 815, Ct of Sess (no referral where no arbitral dispute).

7 Formerly, under the Arbitration Act 1950 s 24(2), in disputes which arose involving the question of whether one party to an arbitration agreement had been guilty of fraud, the High Court had power to order that the agreement should cease to have effect, and to give leave to revoke the authority of any arbitrator appointed by the agreement, but that provision has been repealed and the court no longer has such powers.

8 See para 110 et seq ante.

9 *Heyman v Darwins Ltd* [1942] AC 356 at 371, [1942] 1 All ER 337 at 345, HL, per Lord Macmillan; and see ARBITRATION. Cf *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 All ER 897, CA, where it was held that the question of initial illegality of a contract, not directly impeaching the arbitration clause, was capable of being within the jurisdiction of an arbitrator.

10 See the Arbitration Act 1996 s 30(1). See also ss 31, 32, 66, 67; and ARBITRATION vol 2 (2008) PARA 1239 et seq.

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201. When arbitration clause does not apply.

If the contract is itself assignable, the arbitration clause, being part of that contract, is also assignable¹; but if a contractor assigns the right to receive all the money due or to become due under a contract, the contract otherwise remaining in force between himself and the employer, and the contract contains an arbitration clause, the arbitrator has no power to make an award of such money in favour of the contractor².

Where the arbitration clause provided that the reference should not be opened until after the completion of the works and the contractor determined the contract before completion (as he had power to do under a clause in the contract) it was held that the arbitrator had no jurisdiction³. Limitations on the opening of the reference are strictly construed⁴.

Where a sub-contractor agrees to be bound by the terms of a principal contract, which contains a clause referring disputes between the employer and the contractor to arbitration, this does not necessarily operate as a submission to arbitration of disputes between the contractor and the sub-contractor, unless the language used by the parties to the sub-contract points plainly to an intention to incorporate the arbitration clause⁵ in the main contract⁶.

In many building disputes the employer will wish to bring a claim against the contractor, with whom he may have an arbitration agreement, and against the architect or engineer, with whom he may not have an arbitration agreement or an agreement requiring the disputes to be referred to the same arbitrator⁷. In these circumstances, the court is nonetheless obliged to grant a stay of proceedings unless the applicant has taken a step in proceedings to answer the substantive claim⁸ or the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed⁹. Once arbitration proceedings are started, the court will not readily revoke the authority of the arbitrator¹⁰.

1 *Shayler v Woolf* [1946] Ch 320, [1946] 2 All ER 54, CA (explaining observations of Wright J in *Cottage Club Estates Ltd v Woodside Estates Co (Amersham)* [1928] 2 KB 463); *Aspell v Seymour* [1929] WN 152, CA; cf *Herkules Piling Ltd and Hercules Piling Ltd v Tilbury Construction Ltd* (1992) 61 BLR 107, (1992) 32 ConLR 112.

2 *Cottage Club Estates Ltd v Woodside Estates Co (Amersham) Ltd* [1928] 2 KB 463.

3 *Smith v Martin* [1925] 1 KB 745, CA. Note that the arbitrator has power under the Arbitration Act 1996 to rule on his own jurisdiction: see para 200 ante.

4 See *AE Farr Ltd v Ministry of Transport* [1960] 3 All ER 88, [1960] 1 WLR 956, where all disputes 'except as to the withholding by the engineer of any certificate' were not to be referred until after the completion of the works. A refusal to include a particular item within any certificate by the engineer was held by Buckley J to create a dispute to which the proviso applied. See also observations of Viscount Dilhorne in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 709, [1973] 3 All ER 195 at 208, HL.

5 *Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd* (1993) 37 ConLR 84, CA.

6 Note that authority, both in the Court of Appeal and at first instance, provides somewhat uncertain guidance as to the evidence which will be sufficient to show an intention to incorporate an arbitration clause by reference. In some cases such an intention has been discerned, notwithstanding the absence of express words of incorporation: *Modern Building Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 2 All ER 549, [1975] 1 WLR 1281, CA; *Roche Products Ltd v Freeman Process Systems Ltd* (1996) 80 BLR 102; *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership* (1998) 65 ConLR 11. In other cases, the absence of such express words has proved fatal to the incorporation: *Aughton Ltd v MF Kent Services Ltd* (1991) 57 BLR 1, (1991) 31 ConLR 60, CA; *Lexair Ltd v Edgar W Taylor Ltd* (1993) 65 BLR 87; *Co-operative Wholesale Society Ltd v Saunders & Taylor Ltd* (1994) 39 ConLR 77, (1994) 11 Const LJ 118.

7 *Sidney Kaye, Eric Firmin & Partners v Bronesky* (1973) 4 BLR 1, (1973) 226 Estates Gazette 1395, CA.

8 See the Arbitration Act 1996 s 9(3); and ARBITRATION vol 2 (2008) PARA 1222.

9 See *ibid* s 9(4); and ARBITRATION vol 2 (2008) PARA 1222.

10 For the circumstances in which the arbitrator's authority may be revoked see *ibid* ss 18, 23, 24; and para 202 post. See generally ARBITRATION.

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202. Distinction between arbitration and certification.

Under most building contracts, the architect or engineer is required to issue certificates. In the nineteenth and early twentieth centuries it was common for contracts to provide that, in the case of dispute, the architect or engineer was also to act as arbitrator. Such provisions are now uncommon, if not unknown. A court would, it is thought, nowadays require very clear words to conclude that the contract was intended to confer such powers upon an architect or engineer¹.

The granting of certificates under a building contract is not an arbitration or award within the meaning of the Arbitration Act 1996² unless express words show that the certificates were intended to be given only after arbitration proceedings³.

When the architect acts as certifier, his appointment is irrevocable unless the contract shows a contrary intention⁴. The authority of an arbitrator under an arbitration agreement may be revoked by the parties acting jointly, an arbitral institution in whom the parties have vested such powers or, in certain circumstances, the court⁵.

1 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann. For examples of cases concerning the distinction between the architect's role as certifier and arbitrator see *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Northampton Gas Light Co v Parnell* (1855) 15 CB 630; *Collins v Collins* (1858) 26 Beav 306; *Scott v Liverpool Corp'n* (1858) 28 LJCh 230; *Mills v Bayley* (1863) 2 H & C 36; *Wadsworth v Smith* (1871) LR 6 QB 332 at 337 per Blackburn J; *Tough v Dumbarton Waterworks Comrs* (1872) 11 M 236, Ct of Sess; *Lawson v Wallasey Local Board* (1883) 48 LT 507, CA; *Re Dawdy* (1885) 15 QBD 426, CA; *Re Carus-Wilson and Greene* (1886) 18 QBD 7, CA; *Re Hammond and Waterton* (1890) 62 LT 808, DC; *North British Rly Co v Wilson* 1911 SC 738; *Taylor v Yielding* (1912) 56 Sol Jo 253; *Monmouth County Council v Costelloe and Kemple Ltd* (1965) 63 LGR 429 at 434, CA, per Harman LJ; *A Cameron Ltd v John Mowlem & Co plc* (1990) 52 BLR 24, CA.

2 *Sutcliffe v Thrackrah* [1974] AC 727, [1974] 1 All ER 859, HL.

3 Again, it is thought that very clear words would be required to give rise to such a conclusion. Even in the nineteenth century such a construction was generally rejected: see eg *Wadsworth v Smith* (1871) LR 6 QB 332.

4 *Mills v Bayley* (1863) 2 H & C 36.

5 See the Arbitration Act 1996 ss 18, 23, 24; and ARBITRATION vol 2 (2008) PARAS 1227, 1228, 1232, 1233.

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203. Disqualification of arbitrator for bias.

An arbitrator has a general duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent¹. The court may remove an arbitrator where circumstances exist that give rise to justifiable doubts as to his impartiality². These doubts may be held to exist where the arbitrator is actually biased, where he has an interest in the outcome of the case or where there is a real possibility of bias³.

The general law as to the disqualification of arbitrators for bias or lack of impartiality applies equally to building contract arbitrations. In the past⁴ the architect or engineer was sometimes also appointed as arbitrator. In those circumstances, the arbitrator was both an agent of a party to the arbitration and obliged to review decisions which he had himself made in administering the contract⁵. In cases of this kind the court had to consider on a number of occasions whether the architect or engineer arbitrator was thereby disqualified for bias. It is thought that these decisions are now of doubtful relevance and authority since it is now uncommon, if not unknown, for parties to appoint the architect or engineer as arbitrator⁶ and nineteenth century notions as to conflict of interest and independence are no longer accepted by the court⁷.

1 See the Arbitration Act 1996 s 33(1)(a); and ARBITRATION vol 2 (2008) PARA 1243.

2 See *ibid* s 24(1)(a); and ARBITRATION vol 2 (2008) PARA 1233.

3 *R v Gough* [1993] AC 646, [1993] 2 All ER 724, HL; *Porter v Magill*, *Weeks v Magill* [2001] UKHL 67 at [103], [2002] 1 All ER 465 at [103], [2002] 2 WLR 37 at [103] (restating the test in *R v Gough* supra as the test of 'a real possibility'). See also *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, CA; *AT & T Corp'n v Saudi Cable Co* [2000] BLR 743, [2000] 2 Lloyd's Rep 127, CA. As to bias of arbitrators see further ARBITRATION vol 2 (2008) PARA 1233. As to the rule against bias see JUDICIAL REVIEW vol 61 (2010) PARA 631 et seq.

4 In the nineteenth and early twentieth centuries: see para 202 ante. '... [T]he notion of what amounted to a conflict of interest was not then as well understood as it is now ...': *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann.

5 For cases concerning the effect of an arbitrator being one of the parties see *Johnston v Cheape* (1817) 5 Dow 247 at 262; *Morgan v Morgan* (1832) 2 LJEx 56; *Phipps v Edinburgh and Glasgow Rly Co* (1843) 5 D 1025, Ct of Sess; *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72; *Drew v Drew* (1855) 2 Macq 1, HL; *Hughes v Liverpool Corp'n* (1866) cited in Annual Practice 1892 at 164; *Re Wansbeck Rly Co and Trowsdale* (1866) LR 1 CP 269; *Beddow v Beddow* (1878) 9 ChD 89 at 93-94; *Scott v Carlisle Local Authority* (1879) 16 SLR 435; *Mackay v Barry Parochial Board* (1883) 10 R 1046, Ct of Sess; *Adams v Great North of Scotland Rly Co* (1889) 26 SLR 765 at 772; *Nuttall v Manchester Corp'n* (1892) 8 TLR 513; *Re Baring Bros & Co and Doulton & Co* (1892) 61 LJQB 704, DC; *Jackson v Barry Rly Co* [1893] 1 Ch 238, CA; *Re Donkin and Leeds and Liverpool Canal Co of Proprietors* (1893) 9 TLR 192; *Re Frankenberg and Security Co* (1894) 10 TLR 393; *Ives and Barker v Willans* [1894] 2 Ch 478, CA; *Eckersley v Mersey Docks and Harbour Board* [1894] 2 QB 667, CA; *Belcher v Roedean School Site and Buildings Ltd* (1901) 85 LT 468, CA; *Cross v Leeds Corp'n* (1902) 2 Hudson's BC (4th Edn) 339, CA; *Buchan v Melville* (1902) 4 F 620, Ct of Sess; *Wells v Army and Navy Co-operative Society* (1902) 86 LT 764; *Halliday v Duke of Hamilton's Trustees* (1903) 40 SLR 628; *Blackwell & Co Ltd v Derby Corp'n* (1909) 75 JP 129, CA; *Freeman & Sons v Chester RDC* [1911] 1 KB 783, CA; *M'Kee v Dublin Corp'n and O'Sullivan* (1912) 2 Hudson's BC (4th Edn) 466; *Bristol Corp'n v John Aird & Co* [1913] AC 241, HL; *Crawford v Northern Lighthouse Comrs* 1925 SC (HL) 22; *Panamena Europea Navigacion (Compania Ltda) v Frederick Leyland & Co Ltd (J Russell & Co)* [1947] AC 428, HL; *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326. However, these cases must be read subject to the provisions of the Arbitration Act 1996 (see ARBITRATION vol 2 (2008) PARA 1209 et seq) and to more recent authority: see the text and notes 1-3 supra. In so far as the nineteenth century cases upheld the position of the architect arbitrator it is to be doubted whether these would now be decided in the same way.

6 Such an appointment, if made, would be in conflict with the provisions of the Arbitration Act 1996: see the text and notes 1-2 *supra*.

7 See note 4 *supra*.

UPDATE

203 Disqualification of arbitrator for bias

NOTE 2--See *Makers UK Ltd v Camden LBC* [2008] EWHC 1836 (TCC), (2008) 120 ConLR 161 (nominating body not in breach of its own rules in listening to and acting on representations made to it as to attributes or name of the person to be appointed).

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204. Arbitration and certification.

Where a building contract contains a clause by which the determination or certificate of the architect is made final and conclusive between the parties, or is made a condition precedent to any right of the contractor to payment¹, and the contract also contains a clause by which all disputes are to be referred to arbitration, a question arises as to how far the arbitration clause affects the certificate clause².

Where the arbitration clause excludes certain matters in express terms and leaves them to the sole discretion of the architect, no arbitration can arise in respect of these matters except by agreement, and, in the absence of an allegation of fraud, neither the court nor the arbitrator has jurisdiction to review the determination of the architect as to those matters³.

On the other hand, where there is no express restriction of the scope of the arbitration clause but nevertheless the wording of the contract makes it clear that the certificate or the absence of one is to be conclusive of some matter the arbitrator may not review the correctness of the certificate or the failure to issue one⁴.

However, the existence of an arbitration clause in wide terms may show an intention that the certificate is not to be binding and conclusive at all. Such a certificate will have provisional validity only, unless and until reviewed by the arbitrator or court⁵.

When there are two clauses giving similar jurisdiction to the architect or to the arbitrator, and the architect's certificate is made final and conclusive between the parties, the effect seems to be that when the architect has given his certificate before a dispute has actually arisen it is final and conclusive between the parties, but that if a dispute has arisen before the architect has certified, then his power of certifying is destroyed, and the jurisdiction of the arbitrator arises⁶.

Where there is a dispute on an issue which has clearly been referred to the arbitrator for decision the court is likely to hold that it was also intended that the arbitrator should have the powers necessary to give effect to his decision on that issue⁷.

Some contracts provide that a certificate is to have conclusive evidential effect unless specified steps (for example to commence arbitration proceedings) are commenced within a particular period of time. The court's power to extend the time within which an arbitration may be commenced⁸ does not apply to such a step⁹.

1 See paras 125 et seq, 176 ante.

2 As to certification see para 125 et seq ante.

3 *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597; *Lawson v Wallasey Local Board* (1883) 48 LT 507, CA.

4 *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL; cf *Loke Hong Kee Pte Ltd v United Overseas Land Ltd* (1982) 23 BLR 35, PC.

5 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, [1998] 2 All ER 778, HL.

6 *Clemence v Clarke* (1879) 2 Hudson's BC (4th Edn) 54, CA; *Lloyd Bros v Milward* (1895) 2 Hudson's BC (4th Edn) 262, CA.

7 *Brodie v Cardiff Corpn* [1919] AC 337, HL; *Prestige & Co Ltd v Brettell* [1938] 4 All ER 346, CA; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, [1998] 2 All ER 778, HL.

8 See the Arbitration Act 1996 s 12; and ARBITRATION vol 2 (2008) PARA 1221.

9 *Crown Estates Comrs v John Mowlem & Co* (1994) 70 BLR 1, CA; overruling *McLaughlin & Harvey plc v P & O Developments Ltd* (1991) 55 BLR 101. See further para 183 ante.

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205. Multiparty and 'name borrowing' arbitration.

Unless all relevant parties expressly agree to confer such power on the arbitrator, he has no power to order consolidation of proceedings or concurrent hearings in two arbitrations arising out of different contracts¹. Thus some standard forms of contract² attempt to overcome this difference by providing for a dispute concerning a contract or sub-contract to be referred to the arbitrator appointed under another related contract. However, these attempts can be subject to procedural difficulties arising from the absence of contractual privity between three or more parties³. Where the dispute may in reality not concern one person, such as the contractor, but concerns only a sub-contractor and the employer, provision is sometimes made for the claimant to borrow the name of the party not involved and to prosecute the claim in its name. The efficacy of these procedures depends largely on the co-operation of all the parties⁴. For example, where a sub-contractor had obtained, as part of a compromise with the contractor, the right to conduct and control the contractor's arbitration against the employer, the sub-contractor was not bound by the contractor's defence to its claim⁵. Where in a main contract arbitration the arbitrator made an award of a sum which should have been certified as due in respect of the sub-contract works, that sum fell to be treated as a sum duly certified so that, in this respect, the award was binding in the sub-contract arbitration⁶.

1 See the Arbitration Act 1996 s 35; and ARBITRATION vol 2 (2008) PARA 1249. See also *Oxford Shipping Co Ltd v Nippon Yusen Kaisha* [1984] 3 All ER 835, [1984] 2 Lloyd's Rep 373.

2 As to standard forms of contracts see para 2 ante.

3 For cases on the subject see *Higgs & Hill Building Ltd v Campbell Denis Ltd* [1983] Com LR 34, 28 BLR 47; *Multi-Construction (Southern) Ltd v Stent Foundations Ltd* (1988) 41 BLR 98, (1988) 14 ConLR 110; *Hyundai Engineering and Construction Co Ltd v Active Building and Civil Construction Pte Ltd* (1988) 45 BLR 62; *MJ Gleeson Group Ltd v Wyatt of Snetterton* (1994) 72 BLR 15, (1994) 11 Const LJ 59, CA; *Trafalgar House Construction (Regions) Ltd v Railtrack plc* (1995) 75 BLR 55, [1995] CILL 1056; *Lafarge Redland Aggregates Ltd v Shephard Hill Civil Engineering Ltd* [2001] 1 All ER 34, [2000] 1 WLR 1621, HL. As to privity of contract see CONTRACT vol 9(1) (Reissue) para 748 et seq.

4 For cases on 'name borrowing' provisions see *A Monk & Co Ltd v Devon County Council* (1978) 10 BLR 9, CA; *Lorne Stewart Ltd v William Sindall plc & NW Thames Regional Health Authority* (1986) 35 BLR 109; *Gordon Durham & Co Ltd v Haden Young Ltd* (1990) 52 BLR 61; *Belgravia Property Co Ltd v S & R (London) Ltd* [2001] BLR 424, [2001] All ER (D) 253 (Jul).

5 *A Monk & Co Ltd v Devon County Council* (1978) 10 BLR 9.

6 *Co-operative Wholesale Society Ltd v Birse Construction Ltd* [1997] 29 LS Gaz R 29, 84 BLR 58, CA.

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(iii) Adjudication under Construction Contracts

A. INTRODUCTION

206. Statutory adjudication.

The high cost and perceived delay in the resolution of court and arbitral proceedings has led to the adoption of other means of dispute resolution in the construction industry. These include mediation, expert determination and other methods of alternative dispute resolution.

Part II of the Housing Grants, Construction and Regeneration Act 1996¹ introduced a statutory right of adjudication. A party to a construction contract² has the right to refer a dispute arising under the contract to adjudication³, and provision must be made in the contract to comply with the statutory requirements as to the adjudication procedure⁴. Where the contract does not comply with such requirements, the adjudication provisions of the scheme for construction contracts apply⁵.

The introduction of a statutory right has given rise to a substantial volume of adjudications and reported cases⁶. The statutory regime has largely superseded the procedure formerly found in some standard forms for the appointment of a person to make provisional decisions, binding until decided otherwise in arbitration or litigation⁷.

1 le the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended). As to the application of Pt II (as amended) see para 10 ante.

2 le a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

3 See *ibid* s 108(1); and para 207 post.

4 See *ibid* s 108(2)-(4); and para 207 post.

5 As to the adjudication provisions under the scheme for construction contracts see para 208-213 post. As to the power to make the scheme for construction contracts see para 9 ante.

6 As to the general provisions relating to adjudication arising from such cases see para 207 et seq post.

7 See eg *A Cameron Ltd v John Mowlem & Co plc* (1990) 52 BLR 24, CA.

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B. REQUIREMENTS UNDER THE HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

207. The right to refer a dispute.

A party to a construction contract¹ has the right to refer a dispute² arising under the contract for adjudication³. The contract must:

- 61 (1) enable a party to give notice at any time of his intention to refer a dispute to adjudication⁴;
- 62 (2) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such notice⁵;
- 63 (3) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed⁶ by the parties after the dispute has been referred⁷;
- 64 (4) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred⁸;
- 65 (5) impose a duty on the adjudicator to act impartially⁹; and
- 66 (6) enable the adjudicator to take the initiative in ascertaining the facts and the law¹⁰.

The contract must provide that the decision of the adjudicator is binding until the dispute is finally determined either by legal proceedings, or by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement¹¹. The parties may agree to accept the decision of the adjudicator as finally determining the dispute¹². The contract must also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability¹³.

If the contract does not comply with such requirements¹⁴, the adjudication provisions of the scheme for construction contracts apply¹⁵.

1 le a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 For these purposes, 'dispute' includes any difference: *ibid* s 108(1). See also para 215 post.

3 *Ibid* s 108(1).

4 *Ibid* s 108(2)(a). A notice to refer a dispute to adjudication may be given at any time: *John Mowlem & Co plc v Hydra-Tight Ltd* (2000) CILL 1649. Such notice may therefore be given after determination of the contract (*A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd* (1999) 16 Const LJ 199, (1999) CILL 1518) or subsequent to the issue of court proceedings in respect of the same dispute (*Herschel Engineering Ltd v Breen Property Ltd* [2000] BLR 272, 70 ConLR 1 (cf *Cygnat Healthcare plc v Higgins City Ltd* (2000) 16 Const LJ 394)). However, the permission of the court is required to commence adjudication proceedings against a company in administration: see the Insolvency Act 1986 s 11(3)(d); *A Straume (UK) Ltd v Bradlor Developments Ltd* [2000] 2 TCLR 409, (1999) CILL 1520; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 157.

5 Housing Grants, Construction and Regeneration Act 1996 s 108(2)(b). As to the reckoning of periods of time see para 155 note 2 ante.

6 Agreements are effective for the purposes of *ibid* Pt II (ss 104-117) (as amended) only if in writing: see para 10 ante.

7 *Ibid* s 108(2)(c).

8 *Ibid* s 108(2)(d).

9 *Ibid* s 108(2)(e).

10 *Ibid* s 108(2)(f).

11 *Ibid* s 108(3). See *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315 (TCC), [2002] All ER (D) 39 (Jul).

12 Housing Grants, Construction and Regeneration Act 1996 s 108(3).

13 *Ibid* s 108(4).

14 Ie the requirements of *ibid* s 108(1)-(4): see the text and notes 1-13 *supra*.

15 *Ibid* s 108(5). The scheme is contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649 (see paras 160 ante, 208-213 post). As to the adjudication provisions under the scheme for construction contracts see paras 208-213 post. As to the power to make the scheme for construction contracts see para 9 ante. For England and Wales, the scheme may apply the provisions of the Arbitration Act 1996 (see ARBITRATION vol 2 (2008) PARA 1209 et seq) with such adaptations and modifications as appear to the minister making the scheme to be appropriate: Housing Grants, Construction and Regeneration Act 1996 s 108(6). For the meanings of 'England' and 'Wales' see para 10 note 6 ante.

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NOTE 3--The 1996 Act s 108 is irrelevant where there is a binding agreement making compulsory the reference of disputes to adjudication in the first instance: *DGT Steel and Cladding Ltd v Cubbitt Building and Interiors Ltd* [2007] EWHC 1584 (TCC), [2008] Bus LR 132. See *Domsalla (t/a Domsalla Building Services) v Dyason* [2007] EWHC 1174 (TCC), (2007) 112 ConLR 95 (adjudication involving residential occupier came within s 108).

NOTE 4--There is no time limit for referring a dispute to adjudication: *Connex South Eastern Ltd v MJ Building Services Group Ltd* [2005] EWCA Civ 193, [2005] 2 All ER 870 (adjudication brought 18 months after contract repudiated not abuse of process). The requirement relating to service of the referral notice has to be operated in a sensible and businesslike way: *Cubitt Building and Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC), (2006) 110 ConLR 36.

NOTE 5--See *William Verry Ltd v North West London Communal Mikvah* [2004] BLR 308.

TEXT AND NOTES 7, 8--See *Barnes & Elliot Ltd v Taylor Woodrow Property Management Ltd* [2003] EWHC 3100 (TCC), [2004] BLR 111 (adjudicator reaching decision and communicating it to parties within specified time period; written decision sent to parties one day outside specified time period; adjudication enforceable).

NOTE 11--The enforcement of an adjudicator's award is not subject to the terms of the contract: *Levolux AT Ltd v Ferson Contractors Ltd* [2003] EWCA Civ 11, (2003) 86 ConLR 98. See *Trustees of the Harbours of Peterhead v Lilley Construction Ltd* 2003 SLT 731, OH (term in contract enabling parties to refer same dispute to arbitration in

addition to adjudication). See also *SG South v King's Head Cirencester LLP* [2009] EWHC 2645 (TCC), [2010] BLR 47, [2009] All ER (D) 120 (Nov).

NOTE 15--See *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA 1750, [2004] 1 All ER 818 (adjudicator and judge wrong to proceed on premise that contract existed when defendant had claimed in the alternative that no contract had been formed).

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C. REQUIREMENTS UNDER THE SCHEME FOR CONSTRUCTION CONTRACTS

208. Adjudication provisions under the scheme for construction contracts.

Where a construction contract¹ does not comply with the requirements of the adjudication procedure under the Housing Grants, Construction and Regeneration Act 1996², the adjudication provisions of the scheme for construction contracts apply³.

1 le a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 le *ibid* s 108: see para 207 ante.

3 The scheme is contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 2, Schedule Pt I: see paras 209-213 post.

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209. Notice of intention to seek adjudication.

Any party to a construction contract¹ (the 'referring party') may give written notice ('notice of adjudication') of his intention to refer any dispute arising under the contract, to adjudication², and such notice must be given to every other party to the contract³. The notice of adjudication must set out briefly: (1) the nature and a brief description of the dispute and of the parties involved⁴; (2) details of where and when the dispute has arisen⁵; (3) the nature of the redress which is sought⁶; and (4) the names and addresses of the parties to the contract, including, where appropriate, the addresses which the parties have specified for the giving of notices⁷.

1 I.e a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 2, Schedule Pt I para 1(1).

3 Ibid Schedule Pt I para 1(2).

4 Ibid Schedule Pt I para 1(3)(a).

5 Ibid Schedule Pt I para 1(3)(b).

6 Ibid Schedule Pt I para 1(3)(c).

7 Ibid Schedule Pt I para 1(3)(d).

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NOTE 7--The requirements of the Scheme are merely directory; it would be contrary to its purpose to construe it in a legalistic manner: *Williams (t/a Sanclair Construction) v Noor (t/a India Kitchen)* [2007] All ER (D) 51 (Dec) (failure to name claimant not fatal to notice).

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210. Selection and appointment of adjudicator.

Following the giving of a notice of adjudication¹ and subject to any agreement between the parties to the dispute as to who is to act as adjudicator:

- 67 (1) the referring party² must request³ the person, if any, specified in the contract to act as adjudicator⁴; or
- 68 (2) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party must request the nominating body named in the contract to select a person to act as adjudicator⁵; or
- 69 (3) where neither head (1) nor head (2) above applies, or where the person specified in the contract to act as adjudicator has already indicated that he is unwilling or unable to act and head (2) does not apply, the referring party must request an adjudicator nominating body⁶ to select a person to act as adjudicator⁷.

A person so requested to act as adjudicator must indicate whether or not he is willing to act within two days of receiving the request⁸. The nominating body⁹ or the adjudicator nominating body¹⁰ must communicate the selection of an adjudicator to the referring party within five days of receiving a request to do so¹¹. Where the nominating body or the adjudicator nominating body fails to comply, the referring party may agree with the other party to the dispute to request a specified person to act as adjudicator or request any other adjudicator nominating body to select a person to act as adjudicator¹². The person so requested to act as adjudicator must indicate whether or not he is willing to act within two days of receiving the request¹³.

Where an adjudicator who is named in the contract indicates to the parties that he is unable or unwilling to act, or where he fails to respond to a request to act as adjudicator¹⁴, the referring party may¹⁵: (a) request another person, if any, specified in the contract to act as adjudicator¹⁶; or (b) request the nominating body, if any, referred to in the contract to select a person to act as adjudicator¹⁷; or (c) request any other adjudicator nominating body to select a person to act as adjudicator¹⁸. The person so requested to act must indicate whether or not he is willing to act within two days of receiving the request¹⁹.

Where an adjudicator has been selected²⁰, the referring party must, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (by way of 'referral notice') to the adjudicator²¹. A referral notice must be accompanied by copies of, or relevant extracts from, the construction contract²² and such other documents as the referring party intends to rely upon²³. The referring party must, at the same time as he sends to the adjudicator such documents²⁴, send copies of those documents to every other party to the dispute²⁵.

Any person requested or selected to act as adjudicator²⁶ must be a natural person acting in his personal capacity²⁷. A person requested or selected to act as an adjudicator must not be an employee of any of the parties to the dispute and must declare any interest, financial or otherwise, in any matter relating to the dispute²⁸.

The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract²⁹, and may also, with the consent

of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes³⁰.

Where any party to the dispute objects to the appointment of a particular person as adjudicator, that objection does not invalidate the adjudicator's appointment nor any decision³¹ he may reach³².

1 As to giving of a notice of adjudication under the scheme for construction contracts see para 209 ante.

2 As to the 'referring party' see para 209 ante.

3 The request referred to in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 2, Schedule Pt I paras 2, 5, 6 must be accompanied by a copy of the notice of adjudication: Schedule Pt I para 3.

4 Ibid Schedule Pt I para 2(1)(a).

5 Ibid Schedule Pt I para 2(1)(b).

6 For the purposes of ibid Schedule Pt I paras 2, 5, 6, an 'adjudicator nominating body' means a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party: Schedule Pt I para 2(3).

7 Ibid Schedule Pt I para 2(1)(c).

8 Ibid Schedule Pt I para 2(2).

9 Ie the nominating body referred to in ibid Schedule Pt I paras 2(1)(b), 6(1)(b): see the text and notes 5 supra, 17 infra.

10 Ie the adjudicator nominating body referred to in ibid Schedule Pt I paras 2(1)(c), 5(2)(b) and 6(1)(c).

11 Ibid Schedule Pt I para 5(1). See note 3 supra.

12 Ibid Schedule Pt I para 5(2). See note 3 supra.

13 Ibid Schedule Pt I para 5(3). See note 3 supra.

14 Ie respond in accordance with ibid Schedule Pt I para 2(2): see the text and note 8 supra.

15 Ibid Schedule Pt I para 6(1). See note 3 supra.

16 Ibid Schedule Pt I para 6(1)(a). See note 3 supra.

17 Ibid Schedule Pt I para 6(1)(b). See note 3 supra.

18 Ibid Schedule Pt I para 6(1)(c). See note 3 supra.

19 Ibid Schedule Pt I para 6(2). See note 3 supra.

20 Ie in accordance with ibid Schedule Pt I paras 2, 5 and 6.

21 Ibid Schedule Pt I para 7(1).

22 Ie a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

23 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 7(2).

24 Ie documents referred to in ibid Schedule Pt I para 7(1), (2): see the text and notes 20-23 supra.

25 Ibid Schedule Pt I para 7(3).

26 See note 20 supra.

27 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 4.

28 Ibid Schedule Pt I para 4.

29 Ibid Schedule Pt I para 8(1). All the parties in Schedule Pt I para 8(1), (2) may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these disputes: Schedule Pt I para 8(3). Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of Schedule Pt I para 8, that adjudicator's fees and expenses are to be determined in accordance with Schedule Pt I para 25 (see para 213 post): Schedule Pt I para 8(4).

30 Ibid Schedule Pt I para 8(2). See note 29 *supra*.

31 I.e. a decision reached in accordance with *ibid* Schedule Pt I para 20: see para 213 post.

32 Ibid Schedule Pt I para 10.

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211. Resignation or revocation of appointment of adjudicator.

An adjudicator may resign at any time on giving notice in writing to the parties to the dispute¹, and where an adjudicator so ceases to act the referring party² may serve a fresh notice of adjudication³, and must request an adjudicator to act in accordance with the procedure under the scheme for construction contracts⁴. If requested by the new adjudicator and in so far as it is reasonably practicable, the parties must supply him with copies of all documents which they had made available to the previous adjudicator⁵.

An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication⁶. Where an adjudicator resigns in such circumstances, or where a dispute varies significantly from the dispute referred to him in the referral notice⁷ and for that reason he is not competent to decide it, the adjudicator is entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him⁸. The parties are jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment is to be apportioned⁹.

The parties to a dispute may at any time agree to revoke the appointment of the adjudicator¹⁰. The adjudicator is entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him, and the parties are jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment is to be apportioned¹¹. Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties are not liable to pay the adjudicator's fees and expenses¹².

1 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 2, Schedule Pt I para 9(1).

2 As to the referring party see para 209 ante.

3 Ie under the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 1: see para 209 ante.

4 Ibid Schedule Pt I para 9(3)(a). The procedure is set out in Schedule Pt I paras 2-7: see para 210 ante.

5 Ibid Schedule Pt I para 9(3)(b).

6 Ibid Schedule Pt I para 9(2).

7 As to the referral notice see para 210 ante.

8 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 9(4).

9 Ibid Schedule Pt I para 9(4).

10 Ibid Schedule Pt I para 11(1).

11 Ibid Schedule Pt I para 11(1).

12 Ibid Schedule Pt I para 11(2).

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212. Powers of the adjudicator.

The adjudicator must act impartially in carrying out his duties and must do so in accordance with any relevant terms of the contract and must reach his decision in accordance with the applicable law in relation to the contract¹. He must also avoid incurring unnecessary expense².

The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and must decide on the procedure to be followed in the adjudication³. In particular he may:

- 70 (1) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice⁴ and certain⁵ other documents⁶;
- 71 (2) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom⁷;
- 72 (3) meet and question any of the parties to the contract and their representatives⁸;
- 73 (4) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not⁹;
- 74 (5) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments¹⁰;
- 75 (6) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers¹¹;
- 76 (7) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with¹²; and
- 77 (8) issue other directions relating to the conduct of the adjudication¹³.

The parties must comply with any request or direction of the adjudicator in relation to the adjudication¹⁴. If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, or fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may¹⁵: (a) continue the adjudication in the absence of that party or of the document or written statement requested¹⁶; (b) draw such inferences from that failure to comply as circumstances may, in the adjudicator's opinion, be justified¹⁷; and (c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed¹⁸.

The adjudicator must consider any relevant information submitted to him by any of the parties to the dispute and must make available to them any information to be taken into account in reaching his decision¹⁹. The adjudicator and any party to the dispute must not disclose to any other person any information or document provided to him in connection with the adjudication

which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication²⁰.

Subject to any agreement between the parties to the contrary, any party to the dispute may be assisted by, or represented by, such advisers or representatives, whether legally qualified or not, as he considers appropriate²¹. However, where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary²².

1 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 2, Schedule Pt I para 12(a).

2 Ibid Schedule Pt I para 12(b).

3 Ibid Schedule Pt I para 13.

4 As to the referral notice see para 210 ante.

5 The documents given under the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 7(2): see para 210 ante.

6 Ibid Schedule Pt I para 13(a).

7 Ibid Schedule Pt I para 13(b).

8 Ibid Schedule Pt I para 13(c).

9 Ibid Schedule Pt I para 13(d).

10 Ibid Schedule Pt I para 13(e).

11 Ibid Schedule Pt I para 13(f).

12 Ibid Schedule Pt I para 13(g).

13 Ibid Schedule Pt I para 13(h).

14 Ibid Schedule Pt I para 14.

15 Ibid Schedule Pt I para 15.

16 Ibid Schedule Pt I para 15(a).

17 Ibid Schedule Pt I para 15(b).

18 Ibid Schedule Pt I para 15(c).

19 Ibid Schedule Pt I para 17.

20 Ibid Schedule Pt I para 18.

21 Ibid Schedule Pt I para 16(1).

22 Ibid Schedule Pt I para 16(2).

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213. Adjudicator's decision.

The adjudicator must decide the matters in dispute¹. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute². In particular, he may:

- 78 (1) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive³;
- 79 (2) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and when⁴ that payment is due and the final date for payment⁵;
- 80 (3) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which, simple or compound rates of interest must be paid⁶.

The adjudicator must reach his decision not later than: (a) 28 days after the date of the referral notice⁷; or (b) 42 days after the date of the referral notice if the referring party so consents⁸; or (c) such period exceeding 28 days after the referral notice as the parties to the dispute may, after the giving of that notice, agree⁹. Where the adjudicator fails, for any reason, to reach a decision: (i) any of the parties to the dispute may serve a fresh notice of intention to seek adjudication¹⁰ and must request an adjudicator to act in accordance with the relevant provisions¹¹ of the scheme for construction contracts¹²; and (ii) if requested by the new adjudicator and in so far as it is reasonably practicable, the parties must supply him with copies of all documents which they had made available to the previous adjudicator¹³.

As soon as possible after he has reached a decision, the adjudicator must deliver a copy of that decision to each of the parties to the contract¹⁴. If requested by one of the parties to the dispute, the adjudicator must provide reasons for his decision¹⁵.

The decision of the adjudicator is binding on the parties, and they must comply with it until the dispute is finally determined by legal proceedings, or by arbitration¹⁶ (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties¹⁷. In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it¹⁸. Unless otherwise agreed by the parties, the court¹⁹ may make an order requiring a party to comply with a peremptory order²⁰ made by the tribunal²¹. An application for such an order may be made by the adjudicator (upon notice²² to the parties) or by a party to the adjudication with the permission of the adjudicator (and upon notice to the other parties)²³. However, no such order may be made unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time²⁴. The permission of the court is required for any appeal from a decision of the court under these provisions²⁵.

In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties are required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties²⁶.

The adjudicator is entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him, and the parties are jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment is to be apportioned²⁷.

The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator is similarly protected from liability²⁸.

1 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, reg 2, Schedule Pt I para 20.

2 Ibid Schedule Pt I para 20.

3 Ibid Schedule Pt I para 20(a).

4 Ie subject to the Housing Grants, Construction and Regeneration Act 1996 s 111(4): see para 157 ante.

5 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 20(b).

6 Ibid Schedule Pt I para 20(c).

7 Ibid Schedule Pt I para 19(1)(a). The reference to the referral notice in the text is a reference to the notice mentioned in Schedule Pt I para 7(1) (see para 210 ante): Schedule Pt I para 19(1)(a).

8 Ibid Schedule Pt I para 19(1)(b). As to the referring party see para 209 ante.

9 Ibid Schedule Pt I para 19(1)(c).

10 Ie under ibid Schedule Pt I para 1: see para 209 ante.

11 Ie ibid Schedule Pt I paras 2-7: see para 210 ante.

12 Ibid Schedule Pt I para 19(2)(a).

13 Ibid Schedule Pt I para 19(2)(b).

14 Ibid Schedule Pt I para 19(3).

15 Ibid Schedule Pt I para 22.

16 As to arbitration see paras 199-205 ante.

17 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 23(2). Unlike the determination made in typical arbitration proceedings, an adjudicator's decision is not final and binding, and neither his nomination nor his decision gives rise to an estoppel preventing a party from referring a dispute to the court or to arbitration: *Herschel Engineering Ltd v Breen Property Ltd* [2000] BLR 272, 70 ConLR 1.

18 Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 23(1).

19 'The court' means the High Court or county court: see the Arbitration Act 1996 s 105; and ARBITRATION vol 2 (2008) PARA 1251.

20 'Peremptory order' means an order made under ibid s 41(5) (see ARBITRATION vol 2 (2008) PARA 1250) or made in exercise of any corresponding power conferred by the parties: s 82(2).

21 Ibid s 42(1); Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 24.

22 As to the meaning of 'upon notice' see the Arbitration Act 1996 s 80; and ARBITRATION vol 2 (2008) PARA 1221. For these purposes, references to a notice or other document include any form of communication in writing: s 76(6).

23 Ibid s 42(2); Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 24.

24 Arbitration Act 1996 s 42(4); Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 24.

25 Arbitration Act 1996 s 42(5); Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Schedule Pt I para 24.

26 Ibid Schedule Pt I para 21.

27 Ibid Schedule Pt I para 25.

28 Ibid Schedule Pt I para 26.

UPDATE

213 Adjudicator's decision

NOTE 9--See *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC), [2007] BLR 499 (party acquiesced to extension of time by failing to challenge adjudicator's intention to provide decision at later date).

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D. GENERAL PRINCIPLES RELATING TO ADJUDICATION

214. Jurisdiction.

It is open to a defendant in enforcement proceedings to challenge the decision of an adjudicator on the grounds that he was not empowered by the Housing Grants, Construction and Regeneration Act 1996 to make the decision¹. For example, a decision purportedly made under the statutory provisions relating to the binding nature of an adjudicator's decision² by an adjudicator in respect of a contract which is not a construction contract³ at all, or which is a construction contract entered into before Part II of the Housing Grants, Construction and Regeneration Act 1996⁴ came into force⁵, is not a decision within the meaning of that Act⁶ and is, therefore, not binding on the parties⁷.

Where parties invite the adjudicator to decide the question of jurisdiction they will be bound by his decision⁸, but they will not be so bound if they participate in the adjudication expressly without prejudice to a jurisdictional objection⁹. Participation in an adjudication without objection may estop a party from arguing subsequently that the adjudicator lacked jurisdiction¹⁰.

1 *Project Consultancy Group v Trustees of Gray Trust* [1999] BLR 377 at 380 per Dyson J. See, for example, *Edmund Nuttall Ltd v RG Carter Ltd* [2002] BLR 312.

2 *Ie* under the Housing Grants, Construction and Regeneration Act 1996 s 108(3): see para 207 ante.

3 *Ie* a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

4 *Ie* *ibid* Pt II (ss 104-117) (as amended).

5 *Ibid* ss 104, 105, 106, 108, 114, so far as conferring on the Secretary of State a power to consult, to make orders, regulations or determinations, to give directions, guidance, approvals or consents, to specify matters, or to impose conditions, were brought into force on 11 September 1996 (see the Housing Grants, Construction and Regeneration Act 1996 (Commencement No 1) Order 1996, SI 1996/2352) and were brought into force for all remaining purposes on 1 May 1998 (see the Housing Grants, Construction and Regeneration Act 1996 (England and Wales) (Commencement No 4) Order 1998, SI 1998/650). As to the Secretary of State see para 9 note 4 ante. As to the transfer of certain functions of the Secretary of State, so far as exercisable in relation to Wales, to the National Assembly for Wales see para 9 note 4 ante.

6 *Ie* within the meaning of the Housing Grants, Construction and Regeneration Act 1996 s 108(3): see para 207 ante.

7 *Project Consultancy Group v Trustees of Gray Trust* [1999] BLR 377 at 380 per Dyson J.

8 *Whiteways Contractors (Sussex) Ltd v Impresa Castelli Construction UK Ltd* (2000) 75 ConLR 92, 16 Const LJ 453. See also *Homer Burgess Ltd v Chirex (Aman) Ltd* [2000] BLR 124, Ct of Sess, where it was held that although the adjudicator must address the question of whether a particular dispute arose under a construction contract as a preliminary issue, since a decision of the adjudicator is binding only when it relates to matters of dispute arising under the construction contract, his decision as to whether a particular dispute, or aspect of a dispute, fell within his jurisdiction was not a decision which is binding on the parties.

9 See *Project Consultancy Group v Trustees of the Gray Trust* [1999] BLR 377; cf *Nordot Engineering Services plc v Siemens plc* (2001) CILL 1778.

10 *Maymac Environmental Services Ltd v Faraday Building Services Ltd* (2000) 75 ConLR 101, (2000) CILL 1685.

UPDATE

214 Jurisdiction

TEXT AND NOTES--See *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), (2008) 117 ConLR 1 (adjudicator's jurisdiction extended to addressing consequences of defendant's defence); *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC), (2009) 127 ConLR 110 (adjudicator has jurisdiction over a broad dispute where a narrower dispute has already been adjudicated, but must take care not to override the first decision).

NOTE 9--*Project Consultancy*, cited, applied: *Allied P & L Ltd v Paradigm Housing Group Ltd* [2009] EWHC 2890 (TCC), [2010] BLR 59, [2009] All ER (D) 240 (Nov).

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215. Existence and composition of disputes.

The statutory right to refer disputes to adjudication is a right to refer a dispute arising under the contract¹. A dispute must therefore already be in existence before a valid referral can be made². It is a question of fact in each case as to what is in dispute at any particular moment³. The dispute which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference⁴. The dispute is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference⁵.

1 See the Housing Grants, Construction and Regeneration Act 1996 s 108(1); and para 207 ante.

2 See *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168, 75 ConLR 33.

3 *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168, 75 ConLR 33.

4 *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 at 176, 75 ConLR 33 at 44 per Judge Thornton QC.

5 *Fastrack Contractors Ltd v Morrison Construction Ltd* [2000] BLR 168 at 176-177, 75 ConLR 33 at 44 per Judge Thornton QC. See also *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158, [2000] All ER (D) 68; *Grovedeck Ltd v Capital Demolition Ltd* [2000] BLR 181, [2000] 2 TCLR 689; *Edmund Nuttall Ltd v RG Carter Ltd* [2002] BLR 312.

UPDATE

215 Existence and composition of disputes

NOTE 3--See also *VGC Construction Ltd v Jackson Civil Engineering Ltd* [2008] EWHC 2082 (TCC), (2008) 120 ConLR 178.

NOTE 5--See also *Midland Expressway v Carillion Construction* [2006] EWCA Civ 936, (2006) 107 ConLR 235.

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216. Enforcement.

The courts will generally enforce any decision made by an adjudicator within his jurisdiction. The scheme for construction contracts¹ makes provision in relation to the enforcement of the adjudicator's decision², but apart from that, the usual remedy for failure to pay in accordance with such a decision is to issue proceedings claiming the sum due, followed by an application for summary judgment³.

The court has held that the following matters do not constitute valid grounds for refusing summary judgment or granting a stay of execution:

- 81 (1) the existence of a possible substantial counterclaim⁴;
- 82 (2) the alleged impecuniosity of the party which is referring the dispute to adjudication⁵;
- 83 (3) an erroneous decision by the adjudicator acting within his jurisdiction⁶;
- 84 (4) a defence based upon an alleged breach of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)⁷.

However, summary enforcement has been refused or a stay of execution has been granted where:

- 85 (a) the issues raised could not be resolved by summary process since the defendant had a real prospect of showing that the adjudicator lacked jurisdiction to make his decision, and was questioning whether the contract had ever been concluded⁸;
- 86 (b) the party referring the matter to adjudication is in liquidation at the date of the application for summary judgment so that the provisions relating to bankruptcy set-off⁹ apply, and all claims and cross claims should be resolved in the liquidation¹⁰;
- 87 (c) the adjudicator has proceeded in breach of the rules of natural justice¹¹.

1 le a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante.

2 See para 213 ante.

3 See *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 at 100, CILL 1470 at 1472 per Dyson J. See also *Outwing Construction Ltd v H Randell* [1999] BLR 156, 64 ConLR 59; *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd* [2002] BLR 125.

4 *A & D Maintenance & Construction Ltd v Pagehurst Construction Services Ltd* (1999) 16 Const LJ 199, (1999) CILL 1518.

5 *Absolute Rentals Ltd v Gencor Enterprises Ltd* (2000) CILL 1637; cf *Rainford House Ltd v Cadogan Ltd* [2001] BLR 416, [2001] All ER (D) 144 (Feb).

6 As to mistakes by an adjudicator see para 217 post.

7 le the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6: see para 218 post; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134 et seq. As to the jurisdiction of the adjudicator see para 214 ante.

- 8 See *Project Consultancy Group v Trustees of the Gray Trust* [1999] BLR 377.
- 9 le under the Insolvency Rules 1986, SI 1986/1925, r 4.90.
- 10 See *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, 73 ConLR 135, CA.
- 11 See para 218 post. As to natural justice generally see JUDICIAL REVIEW vol 61 (2010) PARA 629 et seq.

UPDATE

216 Enforcement

NOTE 3--See *CIB Properties Ltd v Birse Construction* [2005] EWHC 2365 (TCC), [2005] 1 WLR 2252, [2004] All ER (D) 256 (Oct); *Redworth Construction Ltd v Brookdale Healthcare Ltd* [2006] EWHC 1994 (TCC), [2006] BLR 366, 110 ConLR 77; *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC), [2008] All ER (D) 157 (Dec); *Hart v Smith* [2009] EWHC 2223 (TCC), [2009] All ER (D) 29 (Sep).

See also *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005] BLR 384, IH (adjudicator's jurisdiction ceased on expiry of time limit); *Workspace Management Ltd v YJL London Ltd* [2009] EWHC 2017 (TCC), [2009] BLR 497, [2009] All ER (D) 119 (Aug) (unjust to allow employer to enforce payment in respect of court costs without taking into account cross-claim based on adjudicator's decision regarding interim certificate).

NOTES 9, 10--Where a party is subject to a company voluntary arrangement, it is important to consider whether the arrangement is in any way due to failure of the other party to pay sums awarded: *Mead General Building Ltd v Dartmoor Properties Ltd* [2009] EWHC 200 (TCC), [2009] BLR 225, [2009] All ER (D) 224 (Mar) (company voluntary arrangement direct result of defendant's failure to pay).

NOTE 9--SI 1986/1925 r 4.90 amended: SI 2003/1730. See also *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2009] EWHC 3222 (TCC), [2010] All ER (D) 126 (Apr).

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217. Mistakes by the adjudicator.

Where the adjudicator's award contains an error, the award stands and is enforceable¹ as long as the adjudicator made the error while acting within his jurisdiction². If the adjudicator decided a dispute that was referred to him, but his decision was mistaken, then his decision is a valid and binding decision even if the mistake was of fundamental importance³. Since neither the Housing Grants, Construction and Regeneration Act 1996⁴ nor the scheme for construction contracts⁵ addresses the question of whether a decision, once taken, can be amended, in the absence of a specific agreement by the parties to the contrary, a term is implied into the agreement for adjudication giving the adjudicator the power to correct an error arising from an accidental slip or omission in the decision, provided that this is done within a reasonable time and without prejudicing the other party⁶.

1 As to the enforcement of the adjudicator's decisions see paras 213, 216 ante.

2 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, 73 ConLR 135, CA; *Shimizu Europe Ltd v Automajor Ltd* [2002] BLR 113. See also *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, CILL 1470; *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46, [2002] BLR 93.

3 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 49 at 54, (1999) 70 ConLR 41 at 48 per Dyson J; affd [2000] BLR 522, 73 ConLR 135, CA. Where an adjudicator misconstrues a statutory provision and consequently makes a decision outside the scope of his jurisdiction it is subject to review by the courts and has no temporary binding effect: *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] BLR 124, SLT 277, Ct of Sess; *Ballast plc v Burrell Co (Construction Management) Ltd* [2001] BLR 529, Ct of Sess.

4 As to the adjudication provisions under the Housing Grants, Construction and Regeneration Act 1996 see para 207 ante.

5 Ie the scheme contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649. As to the adjudication requirements under the scheme for construction contracts see para 208 et seq ante.

6 *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314.

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217 Mistakes by the adjudicator

NOTE 2--See also *Ritchie Bros (PWC) Ltd v David Philp (Commercials) Ltd* 2005 SLT 341, IH (adjudicator's jurisdiction ceased on expiry of time limit).

NOTE 6--See also *Rok Building Ltd v Celtic Composting* [2010] EWHC 66 (TCC), [2010] All ER (D) 107 (Feb) (the adjudicator did not have the right of correction so as to wholly reconsider and re-draft substantive parts of his decision).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/4. LIABILITIES, REMEDIES AND DISPUTES/ (4) DISPUTES/(iii) Adjudication under Construction Contracts/D. GENERAL PRINCIPLES RELATING TO ADJUDICATION/218. Human rights and natural justice.

218. Human rights and natural justice.

It has been held that a party resisting summary enforcement is not able to rely on the right to a fair trial¹ under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)². The right to a fair trial does not apply to an adjudicator's award or adjudication proceedings because they do not involve a final determination³.

However, an adjudicator is obliged to act impartially⁴ and in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit⁵. The court has declined to enforce decisions reached in breach of the rules of natural justice⁶, and refused to enforce decisions vitiated by actual or perceived bias⁷, failure by the adjudicator to consult one party on important submissions made by the other⁸ or participation by the adjudicator in an earlier unsuccessful mediation⁹.

1 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134 et seq.

2 See *Elanay Contracts Ltd v The Vestry* [2001] BLR 33; *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272, 80 ConLR 115. Although the Human Rights Act 1998 s 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a right under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), an adjudicator under the Housing Grants, Construction and Regeneration Act 1996 is not a public authority for those purposes, and is therefore not bound by it: *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] BLR 272, 80 ConLR 115.

3 See *Elanay Contracts Ltd v The Vestry* [2001] BLR 33.

4 See the Housing Grants, Construction and Regeneration Act 1996 s 108(2)(e); and para 207 ante.

5 *Glencot Development and Design Co v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207 at 218, 80 ConLR 14 at 31 per Judge Lloyd QC; *Discairn Project Services Ltd v Opecprime Development Ltd* [2001] BLR 285, 80 ConLR 95. See also *Balfour Beatty Construction Ltd v Lambeth London Borough Council* [2002] BLR 288.

6 See *Discairn Project Services Ltd v Opecprime Development Ltd* [2001] BLR 285, 80 ConLR 95.

7 See *Discairn Project Services Ltd v Opecprime Development Ltd* [2001] BLR 285, 80 ConLR 95; *Woods Hardwick Ltd v Chiltern Air-Conditioning Ltd* [2001] BLR 23.

8 See *Discairn Project Services Ltd v Opecprime Development Ltd* [2001] BLR 285, 80 ConLR 95; *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207, 80 ConLR 14.

9 See *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207, 80 ConLR 14.

UPDATE

218 Human rights and natural justice

TEXT AND NOTES--See *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC), (2009) 127 ConLR 110 (adverse inference against a party resulting from non-disclosure of documents not in breach of natural justice).

NOTE 5--*Balfour Beatty*, cited, reported at (2002) 84 ConLR 1.

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219. Costs.

Whether an adjudicator has jurisdiction to determine liability for the costs of the parties to the adjudication depends upon the proper construction of any relevant contractual terms or applicable adjudication rules¹. There is no power in the scheme for construction contracts² for the adjudicator to award costs between the parties, and, in general, the adjudicator has no jurisdiction to award such costs, but it has been held that he may be given such jurisdiction by an implied agreement between the parties³.

1 See *Bridgeway Construction Ltd v Tolent Construction Ltd* (2000) CILL 1662.

2 I.e. a 'construction contract' as defined in the Housing Grants, Construction and Regeneration Act 1996: see para 9 ante. The scheme is contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649: see paras 160, 208-213 ante.

3 *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] BLR 158, [2000] All ER (D) 68; cf *John Cothliff Ltd v Allen Build (North West) Ltd* (1999) CILL 1530. As to liability for costs see generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

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219 Costs

NOTE 3--See *John Roberts Architects Ltd v Parkcare Homes (No 2) Ltd* [2006] EWCA Civ 64, [2006] BLR 106.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(i) In general/220. The professions engaged in building and civil engineering work.

5. ARCHITECTS AND ENGINEERS

(1) THE PROFESSIONS

(i) In general

220. The professions engaged in building and civil engineering work.

The professional people who may be engaged in building contract work include architects, engineers¹, surveyors and quantity surveyors². Of these, only architects are regulated by statute. An architect³, who must be registered in the register of architects⁴, is one who possesses, with due regard to aesthetic as well as practical considerations, adequate skill and knowledge to enable him to: (1) originate; (2) design and plan; (3) arrange for and supervise the erection of such building or other works calling for skill in design and planning as he might, in the course of his business, reasonably be asked to carry out or in respect of which he offers his services as a specialist⁵. Architects profess in varying degrees to have the knowledge necessary to estimate the probable cost of works to be done and the value of works executed⁶, but this knowledge is usually within the province of quantity surveyors. Naval architects are persons who profess to have corresponding qualifications with regard to the construction of ships.

In building and engineering contracts, the term 'engineer' or 'consulting engineer'⁷ usually means either a civil engineer or a structural engineer⁸. Whilst no prescribed educational or professional qualifications are necessary in order to practise and be known as an engineer, a chartered civil engineer must be a member of the Institution of Civil Engineers⁹. To qualify for membership an applicant must have obtained an approved academic qualification, have had practical experience and training of the appropriate character and duration, and must complete an interview and an examination. The subscriptions and fees are fixed by the council of the institution and that body is also concerned with all other aspects of the management and setting of examinations. An engineer who does not belong to a professional body will usually hold himself out as having professional experience and skill in some particular type of engineering works, for example bridges, roads, or docks.

1 As to the general functions of architects and engineers see para 3 ante. As to resident engineers see para 6 ante.

2 As to surveyors and quantity surveyors see paras 4 ante, 283 et seq post. On some large contracts, the employer may, in addition, engage a project manager to co-ordinate the work of, and liaise with, the professional team. The duties and liabilities of a project manager will depend upon the terms of his engagement. See *Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd* (1996) 82 BLR 92, (1996) 53 ConLR 1; *Pozzolanic Lytag Ltd v Bryan Hobson Associates* [1999] BLR 267, 63 ConLR 81. As to project managers see para 5 ante.

3 The Architects Act 1997 deals with the registration and qualification of architects, but the word 'architect' itself is not defined in the Act. The Act consolidates and replaces a number of enactments relating to architects, namely the Architects (Registration) Act 1931, the Architects (Registration) Act 1934, the Architects Registration Act 1938, and the Architects Registration (Amendment) Act 1969. The Architects Act 1997, except for s 28 (short title, commencement and extent) came into force on 21 July 1997: Architects Act 1997 (Commencement) Order 1997, SI 1997/1672, art 2. The substitution of the Architects Act 1997 for the provisions repealed or revoked by that Act does not affect the continuity of the law: s 27, Sch 2 para 1.

Anything done, or having effect as if done, (including the making of rules) under or for the purposes of any provision repealed or revoked by the Architects Act 1997 has effect as if done under or for the purposes of any corresponding provision of that Act: Sch 2 para 2. Any reference, express or implied, in that Act or any other enactment, or in any instrument or document, to a provision of that Act is, so far as the context permits, to be read as, according to the context, being or including in relation to times, circumstances and purposes before that Act came into force a reference to the corresponding provision repealed or revoked by that Act: Sch 2 para 3. Any reference, express or implied, in any enactment, or in any instrument or document, to a provision repealed or revoked by the Architects Act 1997 is, so far as the context permits, to be read as, according to the context, being or including in relation to times, circumstances and purposes after that Act came into force a reference to the corresponding provision of that Act: Sch 2 para 4(1). In particular, where a power conferred by an Act is expressed to be exercisable in relation to enactments contained in an Act passed before or in the same session as the Act conferring the power, the power is also exercisable in relation to provisions of the Architects Act 1997 which reproduces such enactments: Sch 2 para 4(2). Schedule 2 paras 1-4 have effect in place of the Interpretation Act 1978 s 17(2), but are without prejudice to any other provision of that Act: Architects Act 1997 Sch 2 para 5. Transitional provisions relating to the transition from the Housing Grants, Construction and Regeneration Act 1996 Pt III (repealed) to the Architects Act 1997 are contained in Sch 2 paras 6-19.

4 As to the register of architects see para 233 post. As to restrictions on the use of the title of 'architect' see para 223 post.

5 This is the test laid down by the tribunal set up by the Architects Registration Act 1938 s 2 (repealed), and not disapproved in *R v Architects' Registration Tribunal, ex p Jagger* [1945] 2 All ER 131.

6 As to the liability of the architect for want of competent professional skill see para 253 post.

7 'One whose profession is the designing and constructing of works of public utility, such as bridges, roads, canals, railways, harbours, drainage works, gas and water works, etc': Oxford English Dictionary (2nd Edn, 1989). See also the entry relating to 'civil engineer' in the Dictionary of Architecture.

8 Structural engineers have a particular knowledge of modern building materials and of stresses and loadings involved in structures. Other engineers involved in building and engineering contracts include mechanical engineers and electrical engineers.

9 Founded in 1818 and incorporated by royal charter in 1828. See also *Institution of Civil Engineers v IRC* [1932] 1 KB 149, CA; and para 221 post.

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and PARAS 225A-225D.

220 The professions engaged in building and civil engineering work

TEXT AND NOTES--See Provision of Services Regulations 2009, SI 2009/2999; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 385A.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(i) In general/221. Right to practise in the European Community.

221. Right to practise in the European Community.

Professions connected with building and engineering are subject to European Community principles and directives relating to freedom of establishment and free movement of workers. Nationals of member states who wish to practise a profession in the United Kingdom, and possess qualifications which would entitle them to carry on that activity in some other member state, cannot be prevented from doing so by the competent United Kingdom authority¹ on the grounds of inadequate qualifications². The competent United Kingdom authority may, however, require, from such an applicant, evidence of professional experience, and completion of an adaptation period or of an aptitude test³. The competent authority must accept as proof of good character, solvency, physical or mental health, the certificates issued by the competent authority in the member state of which the applicant is a national⁴.

1 For these purposes, 'competent authority' means, in relation to any document, certificate, diploma or qualification, or period of professional experience, referred to in the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824 (as amended), the authority, body or person in a member state authorised under the laws, regulations or administrative provisions of that state, to issue, award or recognise such document, certificate, diploma or qualification, or to certify any such period: reg 2(1).

2 See the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824 (amended by SI 2000/1960), which implement EC Council Directive 89/48 (OJ L19, 24.1.89, p 16) on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. The following professional associations and organisations connected with building and engineering are among those explicitly included in a non-exhaustive list in the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824, reg 2, Sch 1 (amended by SI 2000/1960) of professional bodies subject to the regulations: the Royal Institution of Chartered Surveyors, the Chartered Institute of Building, the Engineering Council, the Institution of Structural Engineers, the Institution of Civil Engineers, the Institution of Electrical Engineers, the Institution of Gas Engineers, the Institution of Mechanical Engineers, and the Chartered Institution of Building Services Engineers. Absence from the list does not imply that a profession or activity is exempt from the regulations. The European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824 (as amended), do not apply to professions which are the subject of a separate recognition directive. Architecture is subject to such a separate directive, which has been implemented by the Architects Act 1997: see para 234 post. See also Case C-31/00 *Conseil National de l'Ordre des Architectes v Dreessen* [2002] All ER (EC) 423, [2002] All ER (D) 145 (Jan), ECJ.

3 See the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824, reg 6. The grounds on which these extra requirements may be imposed are set out in detail in reg 6. As to the requirements in relation to aptitude tests and adaptation periods see regs 7, 8.

4 See *ibid* reg 9. Where no such certificates are issued by the member state of origin, a declaration on oath must be accepted: see reg 9.

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

221 Right to practise in the European Community

NOTES--SI 1991/824 replaced: European Communities (Recognition of Professional Qualifications) Regulations 2007, SI 2007/2781 (amended by SI 2008/2683, SI 2009/1587, SI 2009/1885).

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222. Unfair competition.

Architects, surveyors, and consulting engineers are excluded¹ from the scope of Chapter I of Part I of the Competition Act 1998², which prohibits agreements between undertakings which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom³. However, partnerships and companies of architects, surveyors, and engineers, may be undertakings for the purposes of European Community competition law, which prohibits agreements between undertakings which may affect trade between member states, and have as their object or effect the prevention, restriction or distortion of competition within the common market⁴.

1 See the Competition Act 1998 s 3(1)(d), Sch 4; and COMPETITION vol 18 (2009) PARA 119.

2 See *ibid* Pt I Ch I (ss 1-16); see COMPETITION vol 18 (2009) PARA 116 et seq.

3 See *ibid* s 2(1), (4); and COMPETITION vol 18 (2009) PARA 116.

4 See the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 81 (as renumbered: see para 16 note 4 ante); and COMPETITION vol 18 (2009) PARA 61 et seq.

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

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223. Restrictions on use of title of 'architect'.

A person must not practise or carry on any business¹ under any name, style or title containing the word 'architect'² unless he is a person registered in the register of architects³ maintained by the Architects Registration Board⁴. A person is not, for the purposes of this restriction, to be treated as not practising by reason only of his being in the employment of another person⁵.

The prohibition of the use of the word 'architect' does not affect the use of the designation 'naval architect', 'landscape architect' or 'golfcourse architect'⁶, or the validity of any building contract in customary form⁷.

A national⁸ of an EEA state⁹ established as an architect in an EEA state other than the United Kingdom¹⁰ is entitled to be enrolled on the list of visiting EEA architects¹¹ subject to an appropriate application to the Registrar of Architects¹². A person enrolled on this list may carry on business under a name, style or title containing the word 'architect' whilst visiting the United Kingdom without being a person registered under the Architects Act 1997 during the period, and in respect of the services, for which his enrolment is effective¹³.

1 For these purposes, 'business' includes any undertaking which is carried on for gain or reward or in the course of which services are provided otherwise than free of charge: Architects Act 1997 s 20(7).

2 See *Jacobowitz v Wicker* [1956] Crim LR 697, DC (use of the letters 'Dip Inc Arch' was not an offence); *Jones v Hellard* (1998) Independent, 19 March, DC (use of 'FRIBA' by a person no longer a registered architect offering his services as an arbitrator was an offence).

3 As to the register of architects see para 233 post.

4 Architects Act 1997 ss 1(1), 4, 20(1). As to the Architects Registration Board see para 226 et seq post. See also *R v Breeze* [1973] 2 All ER 1141, [1973] 1 WLR 994, CA, where it was held that a man falsely describing himself as an architect was in breach of the Trade Descriptions Act 1968 s 14(1)(a)(i), but that it was not necessary to decide whether or not s 14 extended to work of a professional character since the defendant lacked the necessary professional qualifications. See also *Jones, ex p Architects Registration Board v R Baden Hellard* (1999) 14 Const LJ 299, where it was held that the words 'produce' or 'business' should not be limited to practise as an architect or the business of architecture but that, even if they were so limited, they would cover practise as an arbitrator in a building dispute.

5 Architects Act 1997 s 20(6).

6 Ibid s 20(2).

7 Ibid s 20(8). For the use of the title 'architect' by companies, partnerships, etc see para 224 post.

8 For these purposes, 'national' does not include a person who, by virtue of the Treaty of Accession (Brussels, 22 January 1972; TS 16 (1979); Cmnd 7461) Protocol No 3, art 2, is not to benefit from Community provisions relating to the free movement of persons and services: Architects Act 1997 s 25.

9 'EEA state' means any state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183): Architects Act 1997 s 25. The current members of the EEA are the 15 member states of the European Union and, in addition Iceland, Liechtenstein and Norway.

10 For the meaning of 'United Kingdom' see para 25 note 10 ante.

11 Ie the list maintained under the Architects Act 1997 s 12: see para 236 post.

12 See ibid s 12; and para 233 post.

13 Ibid s 20(5).

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

223 Restrictions on use of title of 'architect'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 8--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

NOTE 9--Definition of 'EEA State' omitted: SI 2008/1331.

TEXT AND NOTE 13--1997 Act s 20(5) substituted: SI 2008/1331.

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224. Body corporate, firm or partnership as registered architect.

A body corporate, firm or partnership may carry on business under a name, style or title containing the word 'architect' if the business so far as it relates to architecture is under the control and management of a registered person¹ who does not act at the same time in a similar capacity for any other body corporate, firm or partnership, and if in every premises where such business is carried on it is carried on by or under the supervision of a registered person². Where a partnership has been formed by a group of architects, the liabilities of the partnership and the rights and liabilities of the partners amongst themselves are governed by the general law relating to partnership³.

A partnership formed for the purpose of carrying on practice as building designers may be of any number of persons provided that if the size of the partnership is more than 20 partners, not less than three-quarters of that number are either registered architects⁴ or recognised by the Engineering Council as chartered engineers or by the Royal Institution of Chartered Surveyors as chartered surveyors⁵.

1 For the meaning of 'registered person' see para 233 note 5 post.

2 Architects Act 1997 s 20(3). The Architects Registration Board may by rules provide that s 20(3) does not apply in relation to a body corporate, firm or partnership unless it has provided to the Board such information necessary for determining whether s 20(3) applies as may be prescribed: s 20(4). Such rules are not made by statutory instrument and are not recorded in this work. Since members of the Royal Institute of British Architects are no longer prohibited by their Code of Professional Conduct from being directors of public or private companies, architectural services are commonly provided by companies, whose liability is limited.

3 See generally PARTNERSHIP. As to the right to partnership documents and drawings see para 281 post.

4 See para 234 post.

5 Partnerships (Unrestricted Size) No 4 Regulations 1970, SI 1970/1319 (amended by SI 1992/1438). See also the Partnerships (Unrestricted Size) No 10 Regulations 1992, SI 1992/1439.

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

224 Body corporate, firm or partnership as registered architect

TEXT AND NOTES 1, 2--1997 Act s 20(3) amended: SI 2008/1331.

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225. Unlawful use of title of 'architect'.

An unregistered person¹ practising or carrying on business under any name, style or title containing the word 'architect' is liable, on summary conviction, to a fine².

A person will not, however, be guilty of an offence by reason of the contravention on any particular date of the restrictions on the use of the title 'architect' if the contravention is occasioned by:

- 88 (1) the fact that an application on his part for registration under the Architects Act 1997 had not been granted and notice of the decision not to grant the application had not been duly served under that Act before that date³; or
- 89 (2) the removal of his name from the register of architects in circumstances in which notice is required to be served on him and:
 - 5
 - 8. (a) the notice had not been duly served before that date⁴;
 - 9. (b) the time for bringing an appeal against the removal had not expired at that date⁵; or
 - 10. (c) such an appeal had been duly brought but had not been determined before that date⁶.
- 6

1 For the meaning of 'registered person' see para 233 note 5 post. 'Person' includes a body of persons corporate or unincorporate: Interpretation Act 1978 s 5, Sch 1. As to the register of architects see para 233 post.

2 Architects Act 1997 s 21(1). The fine imposed must not exceed level 4 on the standard scale: s 21(1). As to the standard scale see para 99 note 14 ante. It may also be an offence contrary to the Trade Descriptions Act 1968 s 14(1)(a)(i), for which the maximum penalty is on summary conviction a fine not exceeding the prescribed sum and on conviction on indictment a fine or imprisonment for a term not exceeding two years or both: s 18 (amended by the Magistrates' Courts Act 1980 s 32(2)). See also *R v Breeze* [1973] 2 All ER 1141, [1973] 1 WLR 994, CA; and para 223 note 4 ante.

The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

A magistrates' court must not try an information for an offence under the Architects Act 1997 s 21(1) unless the information was laid within two years from the time when the offence was committed: Magistrates' Courts Act 1980 s 127(1); Architects Act 1997 s 21(4)(a). In relation to Northern Ireland, the Magistrates' Courts (Northern Ireland) Order 1981, SI 1981/1675 (NI 26), art 19(1) (time within which a complaint is to be made) is modified so that the reference to six months is substituted for a reference to two years: see the Architects Act 1997 s 21(4)(b).

3 Ibid s 21(2). As to applications for registration see para 235 post. For the duty to give notice of a refusal of an application for registration see para 235 post.

4 Ibid s 21(3)(a). For the duty to give notice of removal see para 239 post.

5 Ibid s 21(3)(b). As to the bringing of appeals see para 240 post.

6 Ibid s 21(3)(c).

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

225 Unlawful use of title of 'architect'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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225A. Dissolution of the former Commission.

The former Commission for Architecture and the Built Environment¹ ('the old Commission') has been dissolved and replaced by a statutory corporation with the same name ('the Commission')². Provision is made for the transfer of staff³, property, rights and liabilities from the old Commission to the Commission⁴.

1 The company limited by guarantee with registered number 3831652 and the company name 'Commission for Architecture and the Built Environment'.

2 Clean Neighbourhoods and Environment Act 2005 s 91. As to the Commission see PARA 225B.1. For the purposes of any enactment about income tax or corporation tax, the Commission and the old Commission are to be treated as the same person: see s 93.

3 In particular, for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794 (replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246) (see EMPLOYMENT vol 39 (2009) PARA 111 et seq), (1) the functions conferred on the Commission by the Clean Neighbourhoods and Environment Act 2005 are to be treated as transferred to the Commission from the old Commission; (2) that transfer of functions is to be treated as a transfer of an undertaking; (3) each person who was, immediately before s 92 came into force, employed by the old Commission under a contract of employment is to be treated as employed in the undertaking immediately before that date: Sch 3 paras 1, 2, 9.

4 Ibid s 92, Sch 3. The transfer of property, rights and liabilities has effect despite any provision, of whatever nature, which would otherwise prevent, penalise or restrict their transfer by the old Commission, and without any instrument or other formality being required: Sch 3 para 5.

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

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225B. Commission for Architecture and the Built Environment.

1. Constitution and members

There is a body corporate known as the Commission for Architecture and the Built Environment ('the Commission')¹, the members and the chairman of which are appointed by the Secretary of State², for a period of up to four years³. The Commission is to have a minimum of eight and a maximum of sixteen members⁴. Each member, including the chairman, holds and vacates his office in accordance with the terms of his appointment⁵, and may at any time resign by giving notice in writing to the Secretary of State⁶. The Secretary of State may remove a member or the chairman from office on the grounds that (1) a bankruptcy order has been made against the person, his estate has been sequestrated or he has made a composition or arrangement with, or granted a trust deed for, his creditors⁷; or (2) he is, in the opinion of the Secretary of State, unable, unwilling or unfit to discharge the functions of his office⁸. The Commission may appoint staff, agents and advisors⁹ and establish one or more committees¹⁰.

The Commission may pay to or in respect of a member or the chairman such sums as the Secretary of State may determine by way of, or in respect of, remuneration and pensions¹¹. The Commission may pay to or in respect of the chairman or another member, or a person who is not a member of the Commission or a member of staff, but is a member of a committee, sums by way of, or in respect of, allowances and expenses¹². If the Secretary of State thinks that there are special circumstances that make it right for a person ceasing to hold office as chairman or member of the Commission to receive compensation, the Commission may pay to him such compensation as the Secretary of State may determine¹³. The Commission may pay sums to or in respect of a member of staff sums by way of or in respect of remuneration¹⁴. The Commission may also pay sums to or in respect of a member or former member of staff by way of or in respect of allowances, expenses, pensions, gratuities or compensation for loss of employment¹⁵.

The Commission is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown¹⁶, and its property is not to be regarded as the property of, or property held on behalf of, the Crown¹⁷. The Commission's records are public records¹⁸, and its members are disqualified from membership of the House of Commons¹⁹.

1 Clean Neighbourhoods and Environment Act 2005 s 87(1).

2 Ibid Sch 2 para 2(1). Service as a member of the Commission is not service in the civil service of the Crown: Sch 2 para 1(3). A person who immediately before Sch 2 came into force was a member or the chairman of the old Commission is to be treated as having been appointed as a member or the chairman of the Commission under Sch 2 para 2: Sch 2 para 14(1), (2). As to the old Commission see PARA 225A.

3 Ibid Sch 2 para 3(1).

4 Ibid Sch 2 para 2(3). The Secretary of State may by order vary either or both of the numbers specified in Sch 2 para 2(3): Sch 2 para 2(4). The power to make an order conferred on the Secretary of State by any provision of Pt 8 (ss 87-95) includes power to make different provision for different purposes, and power to make consequential, supplementary, incidental, transitional and saving provision: s 95(1), (2). Such a power is exercisable by statutory instrument: s 95(3). The Secretary of State may not make a statutory instrument containing an order under Pt 8 unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 95(4). However, this does not apply to a statutory instrument containing an order under Sch 2 para 2(4), which is subject to annulment in pursuance of a resolution of either House of Parliament: s 95(4), (5).

- 5 Ibid Sch 2 para 2(2).
- 6 Ibid Sch 2 para 3(2).
- 7 Ibid Sch 2 para 3(3)(a).
- 8 Ibid Sch 2 para 3(3)(b). A person who ceases to be a member or the chairman of the Commission may be re-appointed: Sch 2 para 3(4).
- 9 See ibid Sch 2 para 4(1). Service as a member of staff of the Commission is not service in the civil service of the Crown: Sch 2 para 4(2).
- 10 Ibid Sch 2 para 5(1). A committee must include at least one member of the Commission, and may also include other persons (who may include members of staff of the Commission): Sch 2 para 5(2). A committee of the old Commission which was in existence immediately before Sch 2 came into force is to be treated as having been established as a committee of the Commission: Sch 2 para 14(3).
- 11 Ibid Sch 2 para 6(1).
- 12 Ibid Sch 2 para 6(2), (6).
- 13 Ibid Sch 2 para 6(3).
- 14 Ibid Sch 2 para 6(4). Any such payment is subject to any conditions imposed the by Secretary of State: Sch 2 para 6(4).
- 15 Ibid Sch 2 para 6(5).
- 16 Ibid Sch 2 para 1(1).
- 17 Ibid Sch 2 para 1(2).
- 18 Public Records Act 1958 Sch 1 para 3 table Pt 2 (amended by the Clean Neighbourhoods and Environment Act 2005 Sch 2 para 12).
- 19 House of Commons Disqualification Act 1975 s 1(1), Sch 1 Pt II (amended by the Clean Neighbourhoods and Environment Act 2005 Sch 2 para 13) (see PARLIAMENT vol 78 (2010) PARA 908).

2. Proceedings

The Commission¹ may regulate its own proceedings and those of its committees², and the validity of proceedings of the Commission is not affected by the number of members being less than the specified minimum³, or by a defect in the appointment of a person as chairman or member⁴. The Commission may delegate any of its functions to one of its members, a member of its staff, a committee or any other person⁵.

The fixing of the seal of the Commission must be authenticated by the signature of the chairman or of another person authorised by the Commission to act for that purpose⁶. A document purporting to be duly executed under the seal of the Commission, or to be signed on the Commission's behalf, is to be received in evidence and, unless the contrary is proved, is to be treated as having been so executed or signed⁷.

- 1 Ie the Commission for Architecture and the Built Environment (see PARA 225B.1).
- 2 Clean Neighbourhoods and Environment Act 2005 Sch 2 para 8(1). In particular, the Commission may specify a quorum for meetings: Sch 2 para 8(2).
- 3 Ie the minimum as specified for the time being in ibid Sch 2 para 2(3) (see PARA 225B.1 NOTE 4).
- 4 Ibid Sch 2 para 2(5).
- 5 Ibid Sch 2 para 7.

6 Ibid Sch 2 para 11(1).

7 Ibid Sch 2 para 11(2).

3. Accounts and annual report

The Commission¹ must keep proper accounting records and prepare a statement of accounts in respect of each financial year². The Commission must send a copy of the statement to the Secretary of State and to the Comptroller and Auditor General³ within such period, beginning with the end of the financial year⁴ to which the statement relates, as the Secretary of State may, with the consent of the Treasury, direct⁵. The Comptroller and Auditor General must examine, certify and report on a statement of accounts sent to him by the Commission, and lay a copy of the statement and of his report before Parliament⁶.

The Commission must send to the Secretary of State a report on the discharge of its functions during each financial year⁷, and the Secretary of State must lay before Parliament a copy of each such report⁸.

1 ie the Commission for Architecture and the Built Environment (see PARA 225B.1).

2 Clean Neighbourhoods and Environment Act 2005 Sch 2 para 9(1). The statement must be prepared in accordance with directions given, with the consent of the Treasury, by the Secretary of State: Sch 2 para 9(1). The statement must comply with any directions given by the Secretary of State, with the consent of the Treasury, as to (1) the information to be contained in the statement; (2) the form which the statement is to take; (3) the manner in which the information is to be presented; (4) the methods and principles according to which the statement is to be prepared: Sch 2 para 9(2). Such directions may, with the consent of the Treasury, be amended or revoked by the Secretary of State: Sch 2 para 9(6).

3 Ibid Sch 2 para 9(3).

4 The financial year of the Commission is the period of 12 months ending with the 31 March: ibid Sch 2 para 15(2). However, the first financial year of the Commission is the period starting on 1 January 2006, and ending with 31 March 2006: Sch 2 para 15(1), (3); SI 2005/3439.

5 Clean Neighbourhoods and Environment Act 2005 Sch 2 para 9(4).

6 Ibid Sch 2 para 9(5).

7 Ibid Sch 2 para 10(1). The report must be sent within such period, beginning with the end of the financial year to which the report relates, as the Secretary of State may, with the consent of the Treasury, direct: Sch 2 para 10(2).

8 Ibid Sch 2 para 10(3).

4. Dissolution

The Secretary of State may by order¹ make provision for the dissolution of the Commission². Such an order may, in particular, (1) provide for the transfer of property, rights or liabilities of the Commission to another person³; (2) make provision enabling a person to receive anything so transferred (despite any provision which would otherwise prevent, penalise or restrict it)⁴; (3) provide for the transfer of some or all of the functions of the Commission to another person⁵; (4) establish a body corporate⁶; (5) provide for anything done by or in relation to the Commission to have effect as if done by or in relation to another person⁷; (6) permit anything (which may include legal proceedings) which is in the process of being done by or in relation to the Commission when a transfer takes effect, to be continued by or in relation to another person⁸; (7) provide for a reference to the Commission in an enactment, instrument or other document to be treated as a reference to another person⁹. An order which transfers rights and liabilities relating to employees of the Commission must make provision for legislation safeguarding employees' rights¹⁰ to apply to that transfer¹¹.

- 1 As to the power to make orders see PARA 225B.1 NOTE 4.
- 2 Ie the Commission for Architecture and the Built Environment (see PARA 225B.1): Clean Neighbourhoods and Environment Act 2005 s 90(1).
- 3 Ibid s 90(2)(a). The Secretary of State may not make an order providing for the transfer of property, rights, liabilities or functions to a person unless the person has consented to the transfer: s 90(3).
- 4 Ibid s 90(2)(b).
- 5 Ibid s 90(2)(c).
- 6 Ibid s 90(2)(d).
- 7 Ibid s 90(2)(e).
- 8 Ibid s 90(2)(f).
- 9 Ibid s 90(2)(g).
- 10 Ie the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (see EMPLOYMENT vol 39 (2009) PARA 111 et seq).
- 11 Clean Neighbourhoods and Environment Act 2005 s 90(4) (amended by SI 2006/246).

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

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225C. Functions of the Commission.

The functions of the Commission¹ are the promotion of education and high standards in, and understanding and appreciation of architecture and the design, management and maintenance of the built environment². The Commission must discharge its functions in relation to England and may also discharge them in relation to any other place it thinks appropriate³. The Commission may, for any purpose connected with the discharge of its functions (1) provide, or assist in the provision of, public works, services and amenities⁴; (2) take any other steps it thinks appropriate⁵. In particular, the Commission may (a) provide advice and develop and review projects (whether or not it is requested to do so)⁶; (b) provide financial assistance⁷; (c) carry out or support the carrying out of research⁸; (d) commission or assisting in the commissioning of works of art⁹; (e) establish and administer charities¹⁰; (f) invite and accept financial assistance and gifts (financial or otherwise)¹¹; (g) enter into funding or other arrangements or agreements¹²; (h) exploit intellectual property¹³ or any other intangible asset¹⁴; (i) make investments¹⁵; (j) acquire or dispose of land¹⁶; (k) form or participate in the formation of bodies corporate¹⁷. The Commission may make charges in respect of any service provided by it¹⁸. In discharging its functions, the Commission must have regard to national policies and advice relating to sustainable development contained in guidance issued by the Secretary of State¹⁹.

The Secretary of State may by order²⁰ (i) confer further functions on the Commission²¹; (ii) remove functions from the Commission; (iii) make changes to any functions of the Commission²². Provision that may be made in such an order includes provision amending or repealing any provision of an enactment conferring functions on the Commission²³.

1 Ie the Commission for Architecture and the Built Environment (see PARA 225B.1).

2 Clean Neighbourhoods and Environment Act 2005 s 88(1). 'The built environment' includes (1) any structure or area built or designed for human use (such as squares, parks and recreation areas); (2) any area available for public use which is in the vicinity of such a structure or within or in the vicinity of such an area: s 88(10).

3 Ibid s 88(2).

4 Ibid s 88(3)(a). If the Commission has power to take any steps under s 88(3), it may take them anywhere it thinks appropriate: s 88(7).

5 Ibid s 88(3)(b).

6 Ibid s 88(4)(a).

7 Ibid s 88(4)(b). See also PARA 225D.

8 Ibid s 88(4)(c).

9 Ibid s 88(4)(d).

10 Ibid s 88(4)(e).

11 Ibid s 88(4)(f).

12 Ibid s 88(4)(g).

13 'Intellectual property' means (1) any patent, trade mark, registered design, copyright, design right, right in performance or plant breeder's right; (2) any rights under the law of a country outside the United Kingdom which correspond or are similar to those falling within head (1): *ibid* s 88(10).

14 *Ibid* s 88(4)(h).

15 *Ibid* s 88(4)(i). However, the Commission may make an investment only if the form or manner of the investment has been approved by the Secretary of State: s 88(5).

16 *Ibid* s 88(4)(j). The Commission may acquire or dispose of land only with the consent of the Secretary of State: s 88(6).

17 *Ibid* s 88(4)(k). The Commission may form or participate in the formation of a body corporate only with the consent of the Secretary of State: s 88(6).

18 *Ibid* s 88(8).

19 *Ibid* s 88(9).

20 As to the power to make orders see PARA 225B.1 NOTE 4.

21 Such an order may confer a function on the Commission only if the function appears to the Secretary of State to be connected, directly or indirectly, to an existing or former function of the Commission: Clean Neighbourhoods and Environment Act 2005 s 89(2).

22 *Ibid* s 89(1). In preparing a draft of an order, the Secretary of State must consult the Commission: s 89(4).

23 *Ibid* s 89(3).

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

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225D. Financial assistance.

The Secretary of State may give financial assistance to a person for a purpose which appears to the Secretary of State to be connected with the promotion of education or high standards in, or understanding or appreciation of architecture or the design, management or maintenance of the built environment¹. Financial assistance may be given in such form as the Secretary of State thinks fit and in particular may be given by making grants (whether or not repayable), making loans, giving guarantees, incurring expenditure, providing services, staff or equipment², and may be given subject to conditions imposed by the Secretary of State or the Treasury³.

¹ Clean Neighbourhoods and Environment Act 2005 s 94(1). For the meaning of 'the built environment' see PARA 225C. If the Secretary of State makes an order under s 89 (see PARA 225C) he may by order amend s 94 to ensure that the purposes for which financial assistance may be given under s 94 reflect any changes made to the functions of the Commission for Architecture and the Built Environment by the order under s 89: s 94(4). As to the power to make orders see PARA 225B.1 NOTE 4.

² Ibid s 94(2).

³ Ibid s 94(3).

UPDATE

220-225 In general

The Commission for Architecture and the Built Environment has been established as a statutory body to promote architecture and the design, management and maintenance of the built environment: see the Clean Neighbourhoods and Environment Act 2005 Pt 8 (ss 87-95); and paras 225A-225D post.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/226. Functions and powers of the Architects Registration Board.

(ii) Architects' Registration

A. THE ARCHITECTS REGISTRATION BOARD

226. Functions and powers of the Architects Registration Board.

The Architects Registration Board¹ is a body corporate and the independent regulator for the architects' profession in the United Kingdom. The Board is responsible for appointing a Registrar of Architects² to maintain the register of architects³ and a list of visiting EEA architects⁴. In relation to professional conduct, the Board is responsible for maintaining a Professional Conduct Committee⁵ and devising a code of conduct⁶. The Board has power to establish other committees to discharge any of its functions⁷.

The Board may by rules provide for the payment to members of the Board, the Professional Conduct Committee or any committee established by the Board of fees for attendance at meetings of the Board or committee, and of travelling and subsistence allowances in respect of attendance at such meetings or the conduct of business of the Board or committee⁸. The Board may also make rules governing its meetings and procedure⁹. It has a common seal which is authenticated in the prescribed¹⁰ manner, and any document purporting to be sealed with the seal authenticated in that manner is receivable as evidence of the particulars stated in it¹¹.

1 The Architects Registration Board was formerly known as the Architects' Registration Council of the United Kingdom and was established by the Architects (Registration) Act 1931 s 3, Sch 1 (repealed). The Architects' Registration Council was renamed as the Architects Registration Board by the Housing Grants, Construction and Regeneration Act 1996 s 118(1) (repealed). For the transitional provisions in relation to the Board see the Architects Act 1997 s 27, Sch 2.

2 As to the Registrar of Architects see para 233 post.

3 See para 233 post.

4 See para 236 post.

5 See para 238 post.

6 See para 237 post.

7 See para 231 post.

8 Architects Act 1997 s 1, Sch 1 para 23.

9 Ibid Sch 1 para 10. Such rules are not made by statutory instrument and are not recorded in this work.

10 Ie prescribed by rules made by the Board: see *ibid* s 25.

11 Ibid Sch 1 para 12. The Secretary of State may, after consultation with the Board and such other persons or bodies as he thinks fit, by order amend the provisions of Sch 1: Sch 1 para 24(1). Such an order must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Sch 1 para 24(2). As to the Secretary of State see para 9 note 4 ante.

UPDATE

226 Functions and powers of the Architects Registration Board

TEXT AND NOTES--1997 Act s 1A (designation of Board as competent authority in relation to recognition of qualifications of nationals of relevant member states) added: SI 2008/1331.

NOTE 10--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/227. Members and chairman of the Architects Registration Board.

227. Members and chairman of the Architects Registration Board.

The Architects Registration Board¹ consists of seven elected members and eight appointed members². The elected members are elected in accordance with an electoral scheme made by the Board, with the approval of the Privy Council³, after consultation with such bodies as appear to the Board to be representative of architects⁴. Such an electoral scheme may be amended by the Board with the approval of the Privy Council and after consultation with those bodies⁵. The persons qualified to elect the elected members, and to be elected as elected members, are all those who are registered persons⁶ when the election is held⁷. The appointed members are appointed by the Privy Council, after consultation with the Secretary of State⁸ and such other persons or bodies as the Privy Council thinks fit, to represent the interests of users of architectural services and the general public⁹. No registered person is eligible for appointment as an appointed member¹⁰. No proceedings of the Board are invalidated by any defect in the election or appointment of a member¹¹.

The members of the Board must elect a chairman from among themselves¹². The chairman may resign by notice in writing addressed to the Registrar of Architects¹³ and may be removed by a majority vote of the other members of the Board¹⁴. Rules¹⁵ made by the Board may make provision for the appointment of a person to act as chairman in the event of a vacancy in the office of chairman or in such other circumstances as may be prescribed¹⁶. In the event of a tie in any vote of the Board the chairman has an additional casting vote¹⁷.

The quorum of the Board is nine, of whom at least four must be elected members and at least four must be appointed members¹⁸. The Board may exercise its functions even though there is a vacancy among its members¹⁹.

1 As to the functions and powers of the Architects Registration Board see para 226 ante.

2 See the Architects Act 1997 s 1, Sch 1 para 1.

3 As to the Privy Council see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 521-526.

4 Architects Act 1997 Sch 1 para 2(1).

5 Ibid Sch 1 para 2(2).

6 For the meaning of 'registered person' see para 233 note 5 post.

7 Architects Act 1997 Sch 1 para 2(3).

8 As to the Secretary of State see para 9 note 4 ante.

9 Architects Act 1997 Sch 1 para 3(1).

10 Ibid Sch 1 para 3(2).

11 Ibid Sch 1 para 22(2).

12 Ibid Sch 1 para 7(1).

13 As to the Registrar of Architects see para 233 post.

14 Architects Act 1997 Sch 1 para 7(2).

- 15 Such rules are not made by statutory instrument and are not recorded in this work.
- 16 Architects Act 1997 Sch 1 para 7(3).
- 17 Ibid Sch 1 para 8.
- 18 Ibid Sch 1 para 9.
- 19 Ibid Sch 1 para 22(1).

UPDATE

227 Members and chairman of the Architects Registration Board

TEXT AND NOTES 6, 7--1997 Act Sch 1 para 2(3) amended: SI 2008/1331.

TEXT AND NOTE 10--1997 Act Sch 1 para 3(2) amended: SI 2008/1331.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/228. Tenure of office.

228. Tenure of office.

The term of office of a member of the Architects Registration Board¹ is three years². A member may resign at any time by notice in writing addressed to the Registrar of Architects³. The Board may prescribe⁴ grounds, such as repeated absence from meetings or unacceptable professional conduct, on which any member may be removed from office and the procedure for removal⁵. A person who has held office as a member of the Board for a continuous period of six years may not be elected or appointed as a member until at least three years have elapsed since he last held office⁶.

1 As to the functions and powers of the Architects Registration Board see para 226 ante.

2 Architects Act 1997 s 1, Sch 1 para 4(1).

3 Ibid Sch 1 para 4(2). As to the Registrar of Architects see para 233 post.

4 Ie by rules made by the Board: see ibid s 25. Such rules are not made by statutory instrument and are not recorded in this work.

5 Ibid Sch 1 para 4(3).

6 Ibid Sch 1 para 5.

UPDATE

228 Tenure of office

NOTE 4--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/229. Casual vacancies on the Architects Registration Board.

229. Casual vacancies on the Architects Registration Board.

Where a vacancy occurs among the members of the Architects Registration Board¹ otherwise than by the expiry of a member's term of office² the following provision is made. If the vacancy is among the elected members³, the Board must appoint a registered person⁴ to fill it⁵. A person so appointed is to be regarded as an elected member⁶. If the vacancy is among the appointed members⁷, the Privy Council⁸ must appoint a person to fill it⁹. A person so appointed is to be regarded as an appointed member¹⁰.

A person so appointed to fill a vacancy holds office until the date on which the term of office of the member whose vacancy he fills would have expired¹¹.

1 As to the functions and powers of the Architects Registration Board see para 226 ante.

2 As to tenure of office see para 228 ante.

3 As to the appointment of elected members see para 227 ante.

4 For the meaning of 'registered person' see para 233 note 5 post.

5 Architects Act 1997 s 1, Sch 1 para 6(1)(a).

6 Ibid Sch 1 para 6(3).

7 As to the appointment of appointed members see para 227 ante.

8 As to the Privy Council see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) paras 521-526.

9 Architects Act 1997 Sch 1 para 6(1)(b).

10 Ibid Sch 1 para 6(3).

11 Ibid Sch 1 para 6(2) (which is expressed to be subject to Sch 1 para 4(2), (3) (see para 228 ante)). As to the tenure of office of members of the Board see para 228 ante.

UPDATE

229 Casual vacancies on the Architects Registration Board

TEXT AND NOTE 3-5--1997 Act Sch 1 para 6(1)(a) amended: SI 2008/1331.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/230. Staff appointed by the Architects Registration Board.

230. Staff appointed by the Architects Registration Board.

The Architects Registration Board¹ may appoint staff² and the period for which, and the terms on which, its staff are appointed are determined by the Board³. Staff appointed by the Board have the duties which the Board directs⁴. The Board may, in addition to paying salaries to its staff, pay pensions to or in respect of them, or make contributions to the payment of such pensions, and pay them allowances, expenses and gratuities⁵.

1 As to the functions and powers of the Architects Registration Board see para 226 ante.

2 Architects Act 1997 s 1, Sch 1 para 11(1).

3 Ibid Sch 1 para 11(2).

4 Ibid Sch 1 para 11(3).

5 Ibid Sch 1 para 11(4).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/231. Committees.

231. Committees.

The Architects Registration Board¹ may establish such committees as it considers appropriate to discharge certain of its functions² under the Architects Act 1997, or to assist the Board in the discharge by it of any of its functions³. Any committee established by the Board may include persons who are not members of the Board, but if a committee is established to discharge any function of the Board, the majority of the members of the committee must be members of it⁴. Subject to that, the membership of any committee established by the Board is to be determined by the Board⁵. Any committee established by the Board may exercise its functions even though there is a vacancy among its members⁶. No proceedings of any committee established by the Board are invalidated by any defect in the election or appointment of a member⁷. No vote of any committee established by the Board for the discharge of any of its functions is valid unless the majority of those voting are members of the Board⁸. The Board may make rules⁹ governing the term of office of members of any committee established by it, including casual vacancies, and the meetings and procedure, including chairmanship and quorum, of any committee established by it¹⁰.

1 As to the functions and powers of the Architects Registration Board see para 226 ante.

2 The Board may delegate any of its functions under the Architects Act 1997 other than its functions in relation to: (1) prescribing fees under s 6(1), (2) (see para 235 post), s 8(1), (3) (see para 235 post) or s 18(4) (see para 240 post); and (2) acting under s 4(1), (2) (see para 234 post), s 5(1) (see para 234 post), s 6(3) (see para 235 post), s 9(1) (see para 235 post) or s 13(1), (2) or s 13(3) (see para 237 post): s 1, Sch 1 para 18(2).

3 Ibid Sch 1 para 18(1).

4 Ibid Sch 1 para 19(1).

5 Ibid Sch 1 para 19(2).

6 Ibid Sch 1 para 22(1).

7 Ibid Sch 1 para 22(2).

8 Ibid Sch 1 para 20.

9 Such rules are not made by statutory instrument and are not recorded in this work. As to the making of rules generally see para 232 post.

10 Architects Act 1997 Sch 1 para 21.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/A. THE ARCHITECTS REGISTRATION BOARD/232. Power of the Architects Registration Board to make rules.

232. Power of the Architects Registration Board to make rules.

The Architects Registration Board¹ may make rules² generally for carrying out or facilitating the purposes of the Architects Act 1997³. The Board must, before making any such rules, publish a draft of them and give those to whom the rules would be applicable an opportunity of making representations to the Board⁴. The Registrar of Architects⁵ must on payment of the prescribed⁶ charges supply a copy of any rules so made and of any forms prescribed by such rules to any person applying for them⁷.

1 As to the functions and powers of the Architects Registration Board see para 226 ante.

2 The power to make such rules is not exercisable by statutory instrument and such rules are not recorded in this work.

3 Architects Act 1997 s 23(1).

4 Ibid s 23(2).

5 As to the Registrar of Architects see para 233 post.

6 Ie prescribed by rules made by the Board: see the Architects Act 1997 s 25.

7 Ibid s 23(3).

UPDATE

232 Power of the Architects Registration Board to make rules

NOTE 6--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/B. THE REGISTER/233. Register of architects.

B. THE REGISTER

233. Register of architects.

The Architects Registration Board¹ must appoint a person to be known as the Registrar of Architects², and the period for which, and the terms on which, the Registrar is appointed are decided by the Board³. The Registrar has the functions provided by or by virtue of the Architects Act 1997 and any other functions which the Board directs⁴.

The Registrar must maintain the register of architects, in which there must be entered the name of every person entitled to be registered⁵. The register must show the regular business address of each registered person⁶. The Registrar must make any necessary alterations to the register and, in particular, must remove from the register the name of any registered person who has died or has applied in the prescribed⁷ manner requesting the removal of his name⁸.

The Board must publish the current version of the register annually and a copy of the most recently published version must be provided to any person who requests one on payment of a reasonable charge decided by the Board⁹. A copy of the register purporting to be published by the Board is evidence of any matter mentioned in it¹⁰. A certificate purporting to be signed by the Registrar which states that a person: (1) is registered¹¹; (2) is not registered¹²; (3) was registered on a specified date or during a specified period¹³; (4) was not registered on a specified date or during a specified period¹⁴; or (5) has never been registered¹⁵, is evidence of any matter stated¹⁶.

1 As to the Architects Registration Board see para 226 et seq ante.

2 Architects Act 1997 s 2(1).

3 Ibid s 2(2). The Board may, in addition to paying to the Registrar a salary or fees, pay pensions to or in respect of him, or make contributions to the payment of such pensions, and pay him allowances, expenses and gratuities: s 2(4).

4 Ibid s 2(3).

5 Ibid s 3(1). For these purposes, 'registered person' means a person whose name is in the register of architects: s 25. As to the entitlement to be registered see para 234 post.

6 Ibid s 3(2). As to removal from the register following failure to notify a change of address see para 235 post.

7 I.e. prescribed by rules made by the Board: see ibid s 25. Such rules are not made by statutory instrument and are not recorded in this work.

8 Ibid s 3(3).

9 Ibid s 3(4).

10 Ibid s 3(5).

11 Ibid s 3(6)(a).

12 Ibid s 3(6)(b).

13 Ibid s 3(6)(c).

14 Ibid s 3(6)(d).

15 Ibid s 3(6)(e).

16 Ibid s 3(6).

UPDATE

233 Register of architects

TEXT AND NOTES--1997 Act ss 22B, 22C (requirements for administrative co-operation and confidentiality) added: SI 2008/1331.

NOTE 4--1997 Act s 2(3A) added: SI 2008/1331.

TEXT AND NOTES 5-8--1997 Act s 3(1A) added: SI 2008/1331. 1997 Act ss 5A-5E (registration in Part 2 of the register) added: SI 2008/1331.

NOTE 5--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

NOTE 7--1997 Act s 25 now s 25(1) (as renumbered: see NOTE 5).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/B. THE REGISTER/234. Qualifications for registration.

234. Qualifications for registration.

A person who has applied¹ to the Registrar of Architects² in the prescribed³ manner for registration is entitled to be registered if he: (1) holds such qualifications and has gained such practical experience as may be prescribed⁴; or (2) has a standard of competence which, in the opinion of the Architects Registration Board, is equivalent to that demonstrated by satisfying head (1) above⁵. The Board may require a person who applies for registration on the ground that he satisfies head (2) above to pass a prescribed examination in architecture⁶. Before prescribing qualifications or practical experience for the purposes of head (1) above or any such examination⁷, the Board must consult the bodies representative of architects which are incorporated by royal charter and such other professional or educational bodies as it thinks appropriate⁸.

A national⁹ of an EEA state¹⁰ who has applied to the Registrar in the prescribed manner for registration¹¹ is entitled to be registered if he holds a recognised or established EEA qualification¹² or a relevant EEA certificate¹³. A national of an EEA state who is registered¹⁴ must, when using his academic title or any abbreviation of it, express the title or abbreviation in the language or one of the languages of the EEA state in which the body conferring the title is located and must follow the title or abbreviation with the name and location of the body conferring the title¹⁵.

1 As to applications for registration see para 235 post.

2 As to the appointment of the Registrar of Architects see para 233 ante.

3 Ie prescribed by rules made by the Architects Registration Board: see the Architects Act 1997 s 25. Such rules are not made by statutory instrument and are not recorded in this work. As to the Architects Registration Board see para 226 et seq ante.

4 Ibid s 4(1)(a).

5 Ibid s 4(1)(b).

6 Ibid s 4(2). The Board may require a candidate for any examination under s 4(2) to pay a fee of a prescribed amount: s 6(2).

7 Ie any examination for the purposes of ibid s 4(2): see the text to note 6 supra.

8 Ibid s 4(3).

9 For the meaning of 'national' see para 223 note 8 ante.

10 For the meaning of 'EEA state' see para 223 note 9 ante.

11 Ie in pursuance of the Architects Act 1997 s 5: see the text and notes 12-15 infra.

12 A qualification is a recognised EEA qualification for the purposes of ibid s 5 if it is required to be recognised under EEC Council Directive 85/384 (OJ L223, 21.08.85, p 15) on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, art 2 (recognition of qualifications satisfying the requirements of arts 3 and 4 which are included in a list published in the Official Journal in accordance with art 7): Architects Act 1997 s 5(2). A qualification is an established EEA qualification for the purposes of s 5 if it is required to be recognised under EEC Council Directive 85/384 (OJ L223, 21.08.85,

p 15) art 10 or art 14 (recognition of established qualifications set out in art 11 and certain equivalent qualifications): Architects Act 1997 s 5(3).

A recognised EEA qualification or an established EEA qualification must be accompanied by: (1) a certificate issued by a competent authority of an EEA state, in accordance with EEC Council Directive 85/384 (OJ L223, 21.08.85, p 15) art 23(2), stating that the person concerned has gained at least two years' practical training experience in that state under the supervision of a person established as an architect in that state; or (2) a certificate issued by a competent authority of the Federal Republic of Germany, in accordance with art 4(1), stating that the person concerned has gained at least four years' appropriate professional experience in the Federal Republic of Germany: Architects Act 1997 s 5(5). 'Competent authority', in relation to an EEA state, means an authority or body designated by the state in accordance with EEC Council Directive 85/384 (OJ L223, 21.08.85, p 15): Architects Act 1997 s 25.

13 Ibid s 5(1). A certificate is a relevant EEA certificate for the purposes of s 5 if it is issued by a competent authority of an EEA state in accordance with EEC Council Directive 85/384 (OJ L223, 21.08.85, p 15) art 5 or art 12 and states: (1) in the case of a certificate issued in accordance with art 5, that the person concerned is, by reason of his distinguished achievements in the field of architecture, entitled to use the title of architect; or (2) in the case of a certificate issued in accordance with art 12, that the person concerned has been, no later than the date on which that state implemented the Directive, authorised in that state to use the title of architect and that he has pursued activities in the field of architecture effectively for at least three consecutive years during the five years preceding the issue of the certificate: Architects Act 1997 s 5(4).

14 Ie in pursuance of ibid s 5.

15 Ibid s 5(7).

UPDATE

234 Qualifications for registration

TEXT AND NOTES--A Directive-rights national is to be treated as having achieved a standard of competence equivalent to that demonstrated by satisfying the 1997 Act s 4(1)(a) if (1) he produces evidence of a description specified in s 4A(1) and he is either lawfully established as an architect in the relevant European state in which that evidence was issued, or eligible to practise as an architect in that state, as confirmed by a competent authority in that state; (2) he produces to the Registrar a certificate, awarded by a relevant European state other than the United Kingdom, that attests that EC Council Directive 2005/36 art 48(2) applies to him; or (3) he is a person whose case falls within the European Communities (Recognition of Professional Qualifications) Regulations 2007, SI 2007/2781, regs 3(9)(a)-(c) or (e), to whom regs 20-26 apply by reason of operation of reg 3(4), and who is permitted to pursue the profession of architect in the United Kingdom by virtue of Pt 3 (regs 20-35): 1997 Act s 4(2A) added by SI 2002/2842; and substituted by SI 2008/1331). 1997 Act s 4(7) (specifying when evidence is to be treated as issued in a relevant European state) added: SI 2008/1331).

A person may appeal to the High Court if he has made an application under the 1997 Act s 5 or to which s 4(2B) applies and is aggrieved by (1) the refusal of his application; or (2) the failure of the Registrar to comply with s 6(4A) (see PARA 235): s 22(1)(a), (b) (s 22 substituted by SI 2008/1331)). As to the time limits for the bringing of such appeals see the 1997 Act s 22(2)-(5) (s 22 as substituted). On such an appeal the court may make any order which appears appropriate, and no appeal lies from a decision of the court on such an appeal: 1997 Act s 22(7) (s 22 as substituted).

NOTE 3--1997 Act s 25 now s 25(1) (renumbered by SI 2002/2842).

NOTES 4, 5--1997 Act s 4(1) amended: SI 2008/1331.

NOTE 6--1997 Act s 6(2A) added: SI 2008/1331.

TEXT AND NOTES 12-15--1997 Act s 4A substituted for s 5: SI 2008/1331.

NOTE 12--1997 Act s 25 now s 25(1) (as renumbered: see NOTE 3). Definition of 'competent authority' substituted: SI 2008/1331.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(1) THE PROFESSIONS/(ii) Architects' Registration/B. THE REGISTER/235. Application for and continuation of registration.

235. Application for and continuation of registration.

The Architect's Registration Board¹ may require an applicant for registration² to pay a fee of a prescribed amount³. The Board may prescribe the information and evidence to be provided to the Registrar of Architects⁴ in connection with applications for registration⁵.

Where a person has duly applied for registration⁶, if the Registrar is satisfied that the person is entitled to be registered, he must enter his name in the register, but if he is not so satisfied, he must refer the application to the Board⁷. The Registrar must not consider an application for registration⁸ in any case in which it is inappropriate for him to do so (for instance because he is in any way connected with the applicant) and in such a case he must refer the application to the Board⁹. Where a person's application is referred to the Board, the Board must direct the Registrar to enter the person's name in the register if it is satisfied that he is entitled to be registered¹⁰. An application by a national¹¹ of an EEA state¹² for registration¹³ may be refused if there is a disqualifying decision in another EEA state¹⁴ in force in respect of that person¹⁵.

The Registrar must serve on an applicant for registration¹⁶ written notice¹⁷ of the decision on his application: (1) where the application is made on the ground that he holds such qualifications and has gained such practical experience as may be prescribed¹⁸ or where a national of an EEA state has applied in the prescribed manner¹⁹, within three months of his application being duly made²⁰; and (2) where the application is made on the ground that he has a standard of competence which, in the opinion of the Board, is equivalent to that demonstrated by the holding of such qualifications and gaining of such practical experience²¹, within six months of his application being made²².

The Board may require a registered person to pay a retention fee of a prescribed amount if he wishes his name to be retained in the register in any calendar year after that in which it was entered²³. Where, after the Registrar has sent a registered person who is liable to pay a retention fee a written demand for the payment of the fee, the person fails to pay the fee within the prescribed period, the Registrar may remove the person's name from the register²⁴. Where a person whose name has been so removed from the register pays the retention fee, together with any further prescribed fee, before the end of the calendar year for which the retention fee is payable or such longer period as the Board may allow: (a) his name will be re-entered in the register, without his having to make²⁵ an application²⁶; and (b) if the Board so directs, it is to be treated as having been re-entered on the date on which it was removed²⁷.

Where the Registrar serves notice in writing on a registered person asking if he has changed his regular business address, if no answer is received within six months from the sending of the notice, the Registrar must serve further written notice on him²⁸, and if no answer is received within three months from the sending of the further notice, the Registrar may remove his name from the Register²⁹.

Where the Board is not satisfied that a person who: (i) applies³⁰ for registration³¹; (ii) wishes his name to be retained or re-entered³² in the register after the payment of a retention fee³³; or (iii) applies for his name to be re-entered in the register³⁴ after it has been removed following an erasure order³⁵, has gained such recent practical experience as the Board may prescribe, his name must not be entered or re-entered in the register, or must be removed from it, unless he satisfies the Board of his competence to practise³⁶. Any person aggrieved³⁷ by his name not being re-entered in, or being removed from, the Register³⁸ may appeal to the High Court within

three months from the date on which notice of the decision or order concerned is served on him; and on such an appeal the court may make any order which appears appropriate, and no appeal lies from any decision of the court on such an appeal³⁹.

If any person intentionally becomes or attempts to become registered by making or producing or causing to be made or produced any false or fraudulent representation or declaration, whether oral or written, he is guilty of an offence and liable on summary conviction to a fine⁴⁰.

1 As to the Architects Registration Board see para 226 et seq ante.

2 Ie pursuant to the Architects Act 1997 s 4 or s 5: see the text and notes 6-15 infra; and para 233 ante.

3 Ibid s 6(1). 'Prescribed' means prescribed by rules made by the Board: see s 25. Such rules are not made by statutory instrument and are not recorded in this work.

4 As to the appointment of the Registrar of Architects see para 233 ante.

5 Architects Act 1997 s 6(3).

6 Ie under ibid s 4: see the text and notes 7-10 infra; and para 233 ante.

7 Ibid s 4(4).

8 See note 6 supra.

9 Architects Act 1997 s 4(5).

10 Ibid s 4(6).

11 For the meaning of 'national' see para 223 note 8 ante.

12 For the meaning of 'EEA state' see para 223 note 9 ante.

13 Ie in pursuance of the Architects Act 1997 s 5: see para 234 ante.

14 For these purposes, 'disqualifying decision in another EEA state', in relation to any person, means a decision made by a competent authority of an EEA state other than the United Kingdom which: (1) is expressed to be made on the ground that he has committed a criminal offence or has misconducted himself in a professional respect; and (2) has the effect in that state that he is no longer registered or otherwise officially recognised as an architect or that he is prohibited from practising as an architect there: ibid s 25. For the meaning of 'competent authority' see para 234 note 12 ante.

15 Ibid s 5(6).

16 Ie in pursuance of ibid s 4 or s 5.

17 Any notice or document required to be served by or for the purposes of the Architects Act 1997 may be sent by post, and when sent to any registered person is deemed to be properly addressed if addressed to him at his address in the register: s 24(1). Any notice relating to the refusal to register any person must be sent by post as a registered letter: s 24(2).

18 Ie that he satisfies ibid s 4(1)(a): see para 234 ante.

19 Ie in pursuance of ibid s 5.

20 Ibid s 6(4)(a). If, in pursuance of EEC Council Directive 85/384 (OJ L223, 21.08.85, p 15) art 17(4) or art 18(2), the Board consults an EEA state in respect of an application for registration in pursuance of the Architects Act 1997 s 5, the period mentioned in s 6(4)(a) is extended by such period as may elapse between initiating the consultation and the receipt by the Board of a final reply from that state: s 6(5).

21 Ie that he satisfies ibid s 4(1)(b): see para 234 ante.

22 Ibid s 6(4)(b).

23 Ibid s 8(1).

- 24 Ibid s 8(2).
- 25 Ie under ibid s 4 or s 5: see the text and notes 6-15 supra; and para 234 ante.
- 26 Ibid s 8(3)(a).
- 27 Ibid s 8(3)(b).
- 28 Ibid s 11(a). The notice must be sent by post as a registered letter: s 24(2).
- 29 Ibid s 11(b).
- 30 Ie in pursuance of ibid s 4 or s 5: see the text and notes 6-15 supra; and para 234 ante.
- 31 Ibid s 9(1)(a).
- 32 Ie under ibid s 8: see the text to notes 23-27 supra.
- 33 Ibid s 9(1)(b). Where the Board decides that the name of a person to whom s 9(1)(b) applies is to be removed from, or not to be re-entered in, the register, the Registrar must serve written notice of the decision on him within the prescribed period after the date of the decision: s 9(2). The notice must be sent by post as a registered letter: s 24(2).
- 34 Ie under ibid s 18: see para 240 post.
- 35 Ibid s 9(1)(c).
- 36 Ibid s 9(1).
- 37 As to persons aggrieved see JUDICIAL REVIEW vol 61 (2010) PARA 656.
- 38 Ie by virtue of the Architects Act 1997 s 9: see the text to notes 30-36 supra.
- 39 Ibid s 22(a). The court sits as a court of appeal and may review the decision of the Board: see *Hughes v Architects' Registration Council of the United Kingdom* [1957] 2 QB 550, [1957] 2 All ER 436, DC. Appeals are heard in the Queen's Bench Division: see Practice Direction--*Appeals* PD 52 para 22; and CIVIL PROCEDURE vol 12 (2009) PARA 1686. As to the procedure for such appeals see Practice Direction--*Appeals* PD 52 para 22.3; and CIVIL PROCEDURE vol 12 (2009) PARA 1686.
- 40 Architects Act 1997 s 7. The fine imposed must not exceed level 3 on the standard scale: s 7. As to the standard scale see para 99 note 14 ante.

UPDATE

235 Application for and continuation of registration

TEXT AND NOTES--1997 Act s 6A (issuing of certificates of architectural education) added: SI 2008/1331.

NOTE 3--1997 Act s 6(1) amended: SI 2008/1331. 1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

TEXT AND NOTES 4, 5--1997 Act s 6(3) amended, s 6(3A)-(3C) added: SI 2008/1331.

NOTE 7--1997 Act s 4(4) amended: SI 2008/1331.

NOTE 10--1997 Act s 4(6) amended: SI 2008/1331.

NOTE 14--1997 Act s 25 now s 25(1) (as renumbered: see NOTE 3). Definition of 'disqualifying decision in another EEA State' substituted: SI 2008/1331.

TEXT AND NOTES 16-22--1997 Act s 6(4) now s 6(4)-(4B) (substituted by SI 2002/2842; 1997 Act s 6(4), (4B) amended, s 6(4A) further substituted by SI 2008/1331). The Registrar must serve on an applicant written notice of the decision on his application:

1997 Act s 6(4) (as substituted and amended). A notice under s 6(4) must be served (1) in the case of an application by a person who in making the application relies on s 4(1)(a) without also relying on s 4(2A), or relies on s 4(2A), within three months beginning with the date on which the application is made: and (2) in any other case, within six months beginning with the date on which the application is made: s 6(4A) (as substituted). Notice of a refusal in the case of an application by a person who in making the application relies on s 4(2A) must state reasons for the refusal: s 6(4B) (as substituted and amended).

NOTE 20--1997 Act s 6(5) omitted: SI 2008/1331.

TEXT AND NOTES 23-27--1997 Act s 8 amended: SI 2008/1331.

TEXT AND NOTES 28, 29--1997 Act s 11 amended: SI 2008/1331.

TEXT AND NOTES 30-36--1997 Act s 9 amended: SI 2008/1331.

TEXT AND NOTES 37-39--1997 Act s 22 substituted: SI 2008/1331.

NOTE 39--*Practice Direction--Appeals* PD 52 para 22.3 amended.

TEXT AND NOTE 40--1997 Act s 7 amended: SI 2008/1331.

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C. VISITING EEA ARCHITECTS

236. Visiting EEA architects.

In addition to maintaining the register of architects¹, the Registrar of Architects² must maintain a list of visiting EEA architects and must permit any person to inspect it during normal working hours³. The list of visiting EEA architects must show the name and qualifications of each person enrolled on it and the period or periods for which and services in respect of which each enrolment is effective⁴. An application for enrolment on the list is made by supplying:

- 90 (1) a declaration in writing giving particulars of the services to be provided by the person while visiting the United Kingdom⁵ and the period or periods for which he expects to provide them⁶; and
- 91 (2) a certificate, or certificates, issued not more than 12 months previously by the competent authority⁷ of an EEA state⁸ in which he is established as an architect showing that he is lawfully pursuing activities in the field of architecture in an EEA state other than the United Kingdom and holds a recognised or established EEA qualification or a relevant EEA certificate⁹.

A national¹⁰ of an EEA state established as an architect in an EEA state other than the United Kingdom who has so applied to the Registrar is entitled to be enrolled on the list of visiting EEA architects¹¹. Enrolment on the list is for such period or periods and in respect of such services as the Registrar considers appropriate having regard to the particulars given in the declaration made under head (2) above¹². No fee may be charged for enrolment on the list¹³.

A person must not be enrolled on the list of visiting EEA architects at a time when: (a) he is subject to a disqualifying decision in another EEA state¹⁴; (b) he is required¹⁵ to satisfy the Architects Registration Board¹⁶ of his competence to practise but has not done so¹⁷; or (c) his name has been removed from the Register because of a suspension order¹⁸ or an erasure order¹⁹ and has not been re-entered²⁰.

A person's name must be removed from the list of visiting EEA architects if: (i) he becomes established as an architect in the United Kingdom²¹; (ii) he renders services in the United Kingdom otherwise than in accordance with a declaration supplied by him under head (1) above²²; or (iii) he may no longer lawfully pursue activities in the field of architecture in the EEA state in which the certificate supplied under head (2) above showed he was lawfully pursuing such activities²³.

A person enrolled on the list of visiting EEA architects must, when using his title or any abbreviation of it, express the title or abbreviation in the language or one of the languages of the EEA state in which the body conferring the title is located and must follow the title or abbreviation with the name and location of the body conferring the title²⁴. A person enrolled on this list may carry on business under a name, style or title containing the word 'architect' whilst visiting the United Kingdom without being a person registered under the Architects Act 1997 during the period, and in respect of the services, for which his enrolment is effective²⁵.

1 As to the register of architects see para 233 ante.

- 2 As to the Registrar of Architects see para 233 ante.
- 3 Architects Act 1997 s 12(1).
- 4 Ibid s 12(2).
- 5 For the meaning of 'United Kingdom' see para 25 note 10 ante.
- 6 Architects Act 1997 s 12(4)(a).
- 7 For the meaning of 'competent authority' see para 234 note 12 ante.
- 8 For the meaning of 'EEA state' see para 223 note 9 ante.
- 9 Architects Act 1997 s 12(4)(b). As to recognised or established EEA qualifications and relevant EEA certificates see para 234 ante.
- 10 As to the meaning of 'national' see para 223 note 8 ante.
- 11 Architects Act 1997 s 12(3).
- 12 Ibid s 12(5).
- 13 Ibid s 12(6).
- 14 Ibid s 12(7)(a). For the meaning of 'disqualifying decision in another EEA state' see para 235 note 14 ante.
- 15 Ie under ibid s 9(1): see para 235 ante.
- 16 As to the Architects Registration Board see para 226 et seq ante.
- 17 Architects Act 1997 s 12(7)(b).
- 18 As to suspension orders see para 240 post.
- 19 As to erasure orders see para 240 post.
- 20 Architects Act 1997 s 12(7)(c).
- 21 Ibid s 12(8)(a).
- 22 Ibid s 12(8)(b).
- 23 Ibid s 12(8)(c).
- 24 Ibid s 12(9).
- 25 Ibid s 20(5).

UPDATE

236 Visiting EEA architects

TEXT AND NOTES--1997 Act s 12 omitted: SI 2008/1331.

TEXT AND NOTE 25--1997 Act s 20(5) substituted: SI 2008/1331.

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D. PROFESSIONAL CONDUCT

237. Code of conduct.

The Architects Registration Board¹ is under a duty to issue a code laying down standards of professional conduct and practice expected of registered persons². The Board must keep the code under review and vary its provisions whenever it considers it appropriate to do so³. Before issuing or varying the code, the Board must: (1) consult such professional bodies and such other persons with an interest in architecture as it considers appropriate⁴; and (2) publish in such a manner as it considers appropriate notice that it proposes to issue or vary the code, stating where copies of the proposals can be obtained⁵. The Board must provide a copy of the code to any person who requests one on payment of a reasonable charge decided by the Board, and may provide a copy free of charge whenever it considers it appropriate⁶.

Failure by a registered person to comply with the provisions of the code is not to be taken of itself to constitute unacceptable professional conduct⁷ or serious professional incompetence on his part⁸, but must be taken into account in any proceedings⁹, for unacceptable professional conduct or serious professional incompetence, against him¹⁰.

1 As to the Architects Registration Board see para 226 et seq ante.

2 Architects Act 1997 s 13(1). For the meaning of 'registered person' see para 233 note 5 ante. The Board may not establish committees to discharge its functions under s 13(1), (2) or s 13(3): see Sch 1 para 18; and para 231 ante.

3 Ibid s 13(2). See note 2 supra.

4 Ibid s 13(3)(a). See note 2 supra.

5 Ibid s 13(3)(b). See note 2 supra.

6 Ibid s 13(5).

7 For the meaning of 'unacceptable professional conduct' see para 239 post.

8 Architects Act 1997 s 13(4)(a).

9 I.e proceedings under ibid s 14: see para 239 post.

10 Ibid s 13(4)(b). As to the application of the provisions relating to disciplinary proceedings to visiting EEA architects see s 19; and para 239 post. As to the Professional Conduct Committee see para 238 post.

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238. Professional Conduct Committee.

The Architects Registration Board¹ maintains a Professional Conduct Committee² which deals with allegations of unacceptable professional conduct and serious professional negligence³ and makes disciplinary orders⁴. The Committee consists of:

- 92 (1) four elected members⁵ of the Board, including at least one whose address in the register of architects⁶ is in Scotland, or (if there is no elected member whose address in the register is in Scotland or no such elected member who is willing to act) three elected members and one registered person⁷ whose address in the register is in Scotland⁸;
- 93 (2) three appointed members⁹ of the Board¹⁰; and
- 94 (3) two persons nominated by the President of the Law Society¹¹.

The quorum of the Committee is one elected member of the Board, one appointed member of the Board and one person nominated by the President of the Law Society¹². Where the Committee is considering the case of a person whose address in the register is in Scotland, the Committee is not quorate unless there is present a member of the Committee who is a registered person and whose address in the register is in Scotland¹³.

The Board may make rules governing the selection and term of office of members of the Committee, including casual vacancies¹⁴. The Committee may exercise its functions even though there is a vacancy among its members¹⁵. No proceedings of the Committee are invalidated by any defect in the election or appointment of a member¹⁶.

The members of the Committee must elect a chairman from among themselves¹⁷. The chairman may resign by notice in writing addressed to the Registrar of Architects¹⁸, and may be removed by a majority vote of the other members of the Committee¹⁹. Rules²⁰ made by the Board may make provision for the appointment of a person to act as chairman in the event of a vacancy in the office of chairman or in such other circumstances as may be prescribed²¹. In the event of a tie in any vote of the Committee the chairman has an additional casting vote, and in any proceedings relating to a registered person the additional vote must be cast in favour of that person²².

1 As to the Architects Registration Board see para 226 et seq ante.

2 See the Architects Act 1997 s 1(2), (4), Sch 1 Pt II.

3 See *ibid* s 14; and para 239 post.

4 See *ibid* ss 15, 19; and para 239 post.

5 As to the appointment of elected members see para 227 ante.

6 As to the register of architects see para 233 ante.

7 For the meaning of 'registered person' see para 233 note 5 ante.

8 Architects Act 1997 Sch 1 para 13(a).

- 9 As to the appointment of appointed members see para 227 ante.
- 10 Architects Act 1997 Sch 1 para 13(b).
- 11 Ibid Sch 1 para 13(c).
- 12 Ibid Sch 1 para 15(1).
- 13 Ibid Sch 1 para 15(2).
- 14 Ibid Sch 1 para 17.
- 15 Ibid Sch 1 para 22(1).
- 16 Ibid Sch 1 para 22(2).
- 17 Ibid Sch 1 para 14(1).
- 18 Ibid Sch 1 para 14(2)(a). As to the Registrar of Architects see para 233 ante.
- 19 Ibid Sch 1 para 14(2)(b).
- 20 Such rules are not made by statutory instrument and are not recorded in this work.
- 21 Architects Act 1997 Sch 1 para 14(3). 'Prescribed' means prescribed by rules made by the Board: see s 25; and para 232 ante.
- 22 Ibid Sch 1 para 16.

UPDATE

238 Professional Conduct Committee

TEXT AND NOTES 5-11--The Professional Conduct Committee now consists of (1) four elected members of the Board; (2) three appointed members of the Board; (3) three persons nominated by the President of the Law Society; and (4) six persons appointed by the Board, including three persons registered in Part 1 of the register, of whom the address of at least one is in the register in Scotland: 1997 Act Sch 1 para 13 (substituted by SI 2004/655; and amended by SI 2008/1331).

TEXT AND NOTE 12--The quorum of the Committee is now one person nominated by the President of the Law Society, and any two persons taken from one or more of the following categories: (1) the elected members of the Board; (2) the appointed members of the Board; or (3) the persons appointed by the Board: 1997 Act Sch 1 para 15(1) (substituted by the Architects (Professional Conduct Committee) Amendment Order 2004, SI 2004/655). The Committee is not quorate unless there are present (a) a member of the Committee who is a registered person; and (b) a member of the Committee who is neither a registered person nor a person nominated by the President of the Law Society: 1997 Act Sch 1 para 15(1A) (added by the Architects (Professional Conduct Committee) Amendment Order 2004, SI 2004/655).

NOTE 21--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

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239. Professional misconduct, incompetence and disciplinary orders.

Where an allegation is made that a registered person¹ is guilty of unacceptable professional conduct, that is, conduct which falls short of the standard required of a registered person, or serious professional incompetence, or it appears to the Registrar of Architects² that a registered person may be so guilty, the case must be investigated by persons appointed in accordance with rules made by the Architects Registration Board³. Where those persons find that a registered person has a case to answer, they must report their finding to the Professional Conduct Committee⁴. Where the Committee receives such a report in relation to a registered person, it must consider whether he is guilty of unacceptable professional conduct or serious professional incompetence⁵. Before considering whether a registered person is guilty of unacceptable professional conduct or serious professional incompetence, the Committee must serve⁶ written notice on the person outlining the case against him and give him the opportunity to appear before the Committee to argue his case⁷. If the Committee is satisfied, after considering the case, that the registered person is guilty of unacceptable professional conduct or serious professional incompetence, it may make a disciplinary order⁸, namely: (1) a reprimand⁹; (2) a penalty order¹⁰; (3) a suspension order¹¹; or (4) an erasure order¹².

The Committee may also make a disciplinary order where a registered person has been convicted of a criminal offence, other than an offence which has no material relevance to his fitness to practise as an architect¹³.

Where the committee makes such an order, the Registrar must serve written notice of the order on him as soon as is reasonably practicable¹⁴. At appropriate intervals and in such manner as it considers appropriate, the Committee must publish: (a) the names of persons whom it has found guilty of unacceptable professional conduct or serious professional incompetence or in relation to whom it has made a disciplinary order as a result of a person being convicted of a criminal offence other than an offence which has no material relevance to his fitness to practise as an architect¹⁵; and (b) in the case of each person a description of the conduct, incompetence or offence concerned and the nature of any order made¹⁶. Where, after considering the case of a registered person, the Committee is not satisfied that he is guilty of unacceptable professional conduct or serious professional incompetence, it must, if he so requests, publish a statement of that fact in such manner as it considers appropriate¹⁷.

Any person aggrieved¹⁸ by the making of a disciplinary order in relation to him may appeal to the High Court within three months from the date on which notice of the decision or order concerned is served on him; and on such an appeal the court may make any order which appears appropriate, and no appeal lies from any decision of the court on such an appeal¹⁹.

The provisions of the Architects Act 1997, and the provisions of rules made under that Act, relating to disciplinary proceedings apply to a person who is or has been enrolled on the list of visiting EEA architects²⁰ as if that person had been registered²¹ in the register of architects²².

1 For the meaning of 'registered person' see para 233 note 5 ante.

2 As to the Registrar of Architects see para 233 ante.

3 Architects Act 1997 s 14(1). If the Board does not make rules for the appointment of persons to investigate whether registered persons have been guilty of unacceptable professional conduct or serious professional incompetence, the Professional Conduct Committee must consider such questions without any prior

investigation: s 14(7). As to the Architects Registration Board see para 233 et seq ante. As to the Professional Conduct Committee see para 238 ante.

4 Ibid s 14(2).

5 Ibid s 14(3).

6 The notice must be sent by post as a registered letter: ibid s 24(2). As to the service of notices and documents generally see para 235 note 17 ante.

7 Ibid s 14(4). At any such hearing the registered person is entitled to be legally represented: s 14(5). The Board may make rules as to the procedure to be followed by the Committee in proceedings under s 14: s 15(6). Such rules are not made by statutory instrument and are not recorded in this work.

8 Ibid s 15(1)(a).

9 Ibid s 15(2)(a).

10 Ibid s 15(2)(b). Where a penalty order is made the registered person must pay the Board the sum specified in the order: s 16(1). A penalty order may not specify a sum exceeding the amount which, at the relevant time, is the amount specified as level 4 on the standard scale of fines for summary offences: s 16(2). As to the standard scale see para 99 note 14 ante. The 'relevant time' means: (1) in a case within s 15(1)(a) (see the text to note 8 supra), the time of the conduct or incompetence of which the registered person is found guilty; and (2) in a case within s 15(1)(b) (see the text to note 13 infra), the time when he committed the criminal offence of which he has been convicted: s 16(2). The order must specify the period within which the sum specified in it is to be paid: s 16(3). If the person does not pay the sum specified in the order within the period so specified, the Committee may make a suspension order or an erasure order in relation to him: s 16(4). As to suspension and erasure orders see para 240 post. The Board must pay into the Consolidated Fund any sum paid under a penalty order: s 16(5). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 711 et seq.

11 Ibid s 15(2)(c).

12 Ibid s 15(2)(d).

13 Ibid s 15(1)(b). This includes disobedience to a byelaw: *Mellor v Denham* (1880) 5 QBD 467, CA.

Details of a conviction in respect of which a person has become rehabilitated are not admissible in evidence, nor may any such person be questioned thereon. Further, no person may be excluded or dismissed from office by reason of, or by reason of a failure to disclose, such a conviction or any ancillary circumstances. A rehabilitated person is treated for all purposes in law as a person who has not committed the offence or offences which were the subject of the conviction: see the Rehabilitation of Offenders Act 1974 s 4; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660.

If a person who is registered in pursuance of the Architects Act 1997 s 5 (see paras 234-235 ante) becomes subject to a disqualifying decision in another EEA state expressed to be made on the ground that he has committed a criminal offence, he is deemed for the purposes of s 15(1) to have been convicted of that offence: s 15(6).

14 Ibid s 15(3). The notice must be sent by post as a registered letter: s 24(2).

15 Ibid s 15(4)(a). The text refers to a disciplinary order being made under s 15(1)(b): see the text to note 13 supra.

16 Ibid s 15(4)(b).

17 Ibid s 15(5).

18 As to persons aggrieved see JUDICIAL REVIEW vol 61 (2010) PARA 656.

19 Architects Act 1997 s 22(c). The court sits as a court of appeal and may review the decision of the Board: see *Hughes v Architects' Registration Council of the United Kingdom* [1957] 2 QB 550, [1957] 2 All ER 436, DC. Appeals are heard in the Queen's Bench Division: see Practice Direction--*Appeals* PD 52 para 22; and CIVIL PROCEDURE vol 12 (2009) PARA 1686. As to the procedure for such appeals see Practice Direction--*Appeals* PD 52 para 22.3; and CIVIL PROCEDURE vol 12 (2009) PARA 1686.

20 As to visiting EEA architects see para 236 ante.

21 le in pursuance of the Architects Act 1997 s 4: see para 234 ante.

22 Ibid s 19.

UPDATE

239 Professional misconduct, incompetence and disciplinary orders

NOTE 13--1997 Act s 15(6) omitted: SI 2008/1331.

NOTE 19--*Practice Direction--Appeals* PD 52 para 22.3 amended.

TEXT AND NOTES 18, 19--1997 Act s 22 substituted: SI 2008/1331.

TEXT AND NOTES 20-22--1997 Act s 19 omitted: SI 2008/1331.

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240. Removal of names from register.

The Registrar of Architects¹ will remove the name of a registered person² from the register of architects³ where a suspension order⁴ or an erasure order⁵ is made by the Professional Conduct Committee⁶ in relation to such person⁷.

Where a suspension order is made, the Registrar must re-enter the name of the registered person in the register at the end of such period not exceeding two years as is specified in the order⁸.

Where an erasure order is made, the name of the registered person must not be re-entered in the register unless the Architects Registration Board⁹ so directs¹⁰. No application may be made for the name of a person in relation to whom an erasure order has been made to be re-entered in the register: (1) before the end of the period of two years beginning with the date of the erasure order or such longer period specified in the erasure order as the Committee considers appropriate in a particular case¹¹; or (2) where he has made a previous application for his name to be re-entered in the register, before the end of the prescribed¹² period beginning with the date of the decision of the Board on that application¹³. The Registrar must serve¹⁴ on a person who applies for his name to be re-entered in the register written notice of the decision on his application within the prescribed period after the date of the decision¹⁵. The Board may require a person whose name is re-entered in the register to pay a fee of a prescribed amount¹⁶.

The Board may order the Registrar to remove a person's name from the register if it was entered on the register in consequence of his satisfying certain requirements as to EEA qualifications in architecture¹⁷ at a time when there was a disqualifying decision in another EEA state¹⁸ in force in respect of that person¹⁹, at that time the Board was unaware of that fact²⁰, and the Board is satisfied that the person was at that time and is still subject to that disqualifying decision²¹.

Any person aggrieved²² by the Board so ordering the Registrar to remove his name from the register may appeal to the High Court within three months from the date on which notice of the decision or order concerned is served on him; and on such an appeal the court may make any order which appears appropriate, and no appeal lies from any decision of the court on such an appeal²³.

1 As to the Registrar of Architects see para 233 ante.

2 For the meaning of 'registered person' see para 233 note 5 ante.

3 As to the register of architects see para 233 ante.

4 See the Architects Act 1997 s 15(2)(b); and para 239 ante.

5 See *ibid* s 15(2)(c); and para 239 ante.

6 As to the Professional Conduct Committee see para 238 ante.

7 As to the right of appeal against such an order see para 239 ante. As to the application of the provisions relating to disciplinary proceedings to visiting EEA architects see the Architects Act 1997 s 19; and para 239 ante.

8 *Ibid* s 17. As to re-entry in the register see para 235 ante.

- 9 As to the Architects Registration Board see para 226 et seq ante.
- 10 Architects Act 1997 s 18(1). A person who wishes his name to be re-entered in the register under s 18 may be required to satisfy the Board as to his competence to practise: see s 9(1)(c); and para 235 ante.
- 11 Ibid s 18(2)(a).
- 12 Ie prescribed by rules made by the Board: see ibid s 25. Such rules are not made by statutory instrument and are not recorded in this work.
- 13 Ibid s 18(2)(b).
- 14 As to the service of notices and documents generally see para 235 note 17 ante.
- 15 Architects Act 1997 s 18(3).
- 16 Ibid s 18(4).
- 17 Ie if it was entered in pursuance of ibid s 5: see para 234 ante.
- 18 For the meaning of 'disqualifying decision in another EEA state' see para 235 note 14 ante. For the meaning of 'EEA state' see para 223 note 9 ante.
- 19 Architects Act 1997 s 10(1)(a).
- 20 Ibid s 10(1)(b).
- 21 Ibid s 10(1)(c). Where the Board orders the Registrar to remove a person's name from the register under s 10, the Registrar must serve written notice of the removal on him as soon as reasonably practicable: s 10(2). The notice must be sent by post as a registered letter: s 24(2).
- 22 As to persons aggrieved see JUDICIAL REVIEW vol 61 (2010) PARA 656.
- 23 Architects Act 1997 s 22(b). The court sits as a court of appeal and may review the decision of the Board: see *Hughes v Architects' Registration Council of the United Kingdom* [1957] 2 QB 550, [1957] 2 All ER 436, DC. Appeals are heard in the Queen's Bench Division: see Practice Direction--*Appeals* PD 52 para 22. As to the procedure for such appeals see para 22.3.

UPDATE

240 Removal of names from register

NOTE 12--1997 Act s 25 now s 25(1) (renumbered by the Architects' Qualifications (EC Recognition) Order 2002, SI 2002/2842).

TEXT AND NOTES 17-19--1997 Act s 10(1)(a) substituted: SI 2008/1331.

TEXT AND NOTES 22, 23--1997 Act s 22 substituted: SI 2008/1331.

NOTE 23--*Practice Direction--Appeals* PD 52 para 22.3 amended.

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(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS

(i) The Contract and its Duration

241. Employment of architect or engineer.

Where the architect or engineer is employed to design and supervise a building or works, the contract is often informal, but frequently the standard conditions of engagement will be incorporated in the contract¹. Where drawings and plans² are submitted in a competition the published conditions of the competition, coupled with the acceptance by the architect, may constitute a written contract to employ the successful competitor³.

Under Part II of the Housing Grants, Construction and Regeneration Act 1996⁴, the definition of a construction contract⁵ includes an agreement to do architectural, design or surveying work, or to provide advice on building, engineering, interior or external decoration or on the laying-out of landscape in relation to construction operations⁶. Where the engagement of an architect falls within this definition, the provisions of the Housing Grants, Construction and Regeneration Act 1996 relating to the rights and entitlements for the parties to such a contract as to adjudication and payment provisions will apply⁷.

Many government departments, local authorities and large companies employ their own architects and the architect in such cases will enter into a contract of employment⁸.

1 See eg *Sidney Kaye, Eric Firmin & Partners (a firm) v Bronesky* (1973) 226 Estates Gazette 1395, (1973) 4 BLR 1 at 7, CA, per Lawton LJ; but cf *Edwin Hill & Partners v Leakcliffe Properties Ltd* (1984) 29 BLR 43. As to standard conditions see para 2 ante.

2 As to drawings and plans see para 258 post.

3 See eg the litigation resulting from a competition held in 1939: *Adams Holder & Pearson v Trent Regional Health Authority* (1989) 47 BLR 34, CA.

4 Ie the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117) (as amended): see paras 9-10, 155-159, 207 ante.

5 See para 9 ante.

6 Housing Grants, Construction and Regeneration Act 1996 s 104(2).

7 See *ibid* ss 108-113; and paras 155-159, 207 ante. See further para 9 ante.

8 See *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028, for a consequence of having a salaried architect. In that case the employer was held liable to a third party under the Occupiers' Liability Act 1957 and was unable to rely on the defence provided by s 2(4)(b) (see NEGLIGENCE vol 78 (2010) PARA 35), viz that the damage was caused by the fault of an independent contractor, in circumstances where that defence would have been available had the work been supervised entirely by an independent architect.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(i) The Contract and its Duration/242. Extent of power to delegate.

242. Extent of power to delegate.

The employment of an architect or engineer being usually a personal contract, he cannot delegate his duties entirely¹, but he need not individually go into every matter in detail², and may make use of the skill and labour of others in the performance of his duties³. The ordinary course of business would make it unreasonable and impossible for the architect or engineer to be constantly on the site, supervising the construction of every part of the works, and taking upon himself the functions of a clerk of works⁴. The architect or engineer, however, is responsible for the acts and defaults of the subordinates to whom he entrusts the supervision of details⁵. The architect is not entitled to rely implicitly on the judgment of the clerk of works, and, although a clerk of works may be appointed by the employer, the architect may in certain circumstances be liable to his employer for the negligence of the clerk of works⁶. The modern practice is that the clerk of works is the eyes and ears of the architect⁷, though not necessarily the mouth.

1 *Ranger v Great Western Rly Co* (1854) 5 HL Cas 72 at 117 per Lord Brougham. See also *Moresk Cleaners Ltd v Hicks* [1966] 2 Lloyd's Rep 338, 4 BLR 50. Cf *Merton London Borough Council v Lowe* (1981) 18 BLR 130, CA; and CONTRACT vol 9(1) (Reissue) paras 748-764.

2 *Clemence v Clarke* (1879) 2 Hudson's BC (4th Edn) 54, CA.

3 *Kirkwood v Morrison* (1877) 5 R 79, Ct of Sess; and see *British Waggon Co v Lea* (1880) 5 QBD 149.

4 See *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL. For a practical illustration see *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149 (and for engineers see *Oldschool v Gleeson (Construction) Ltd* (1976) 4 BLR 103). Standard conditions of engagement generally provide that the architect is not to be responsible for work done by consultants or specialist contractors, sub-contractors or suppliers nor for the contractor's operational methods: see eg the standard form of agreement for the appointment of an architect. As to standard forms of contract see para 2 ante. See also *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034, [1986] 1 All ER 787, (1985) 32 BLR 1, CA. As to the clerk of works see para 6 ante.

5 *Money Penny v Hartland* (1824) 1 C & P 352 at 354 per Abbott CJ; *Leicester Guardians v Trollope* (1911) 75 JP 197. See para 262 post.

6 *Leicester Guardians v Trollope* (1911) 75 JP 197.

7 *Kensington and Chelsea and Westminster Area Health Authority v Wettern Composites Ltd* (1985) 31 BLR 57 at 85 per Smout J. See also *Gray (Special Trustees of the London Hospital) v TP Bennett & Son (a firm)* (1987) 43 BLR 63 at 85 per Sir William Stabb QC.

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243. Effect of death or disability.

The contract of employment of an architect or engineer is a personal one, and consequently there is an implied condition that the contract will only continue so long as the person employed remains alive, and in sufficiently good health to perform his part of the contract¹. For this reason the death, insanity, or continued disablement by illness of the architect dissolves the contract of employment², and thereafter neither party (nor, in case of death, the representatives of the deceased) can bring a claim for breach of contract save in respect of a right of action which accrued before the dissolution³.

In case of temporary illness, the omission to perform the services contracted to be supplied would not entitle the employer to rescind the contract except where constant personal supervision had been stipulated for⁴.

If the contract has relation to the personal conduct of the employer, his death or retirement puts an end to the contract, but it is not so if the contract has no such relation⁵.

1 This paragraph does not apply to a limited company unless it was the alter ego of the architect or engineer: see generally COMPANIES vol 14 (2009) PARA 121. As to the death or incapacity of a party to a contract see CONTRACT vol 9(1) (Reissue) para 903.

2 *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311. See also *Boast v Firth* (1868) LR 4 CP 1 (apprentice); *Robinson v Davison* (1871) LR 6 Exch 269 (concert singer); *Grove v Johnston* (1889) 24 LR Ir 352 (rate collector).

3 See CONTRACT vol 9(1) (Reissue) para 903.

4 *Cuckson v Stones* (1858) 1 E & E 248. See also *Poussard v Spiers* (1876) 1 QBD 410. As to the payment of architects and engineers in case of death, etc during the course of their employment see *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311; and paras 279-280 post.

5 *Phillips v Alhambra Palace Co* [1901] 1 KB 59 at 63, DC, per Lord Alverstone CJ. See also *Farrow v Wilson* (1869) LR 4 CP 744; *Graves v Cohen* (1929) 46 TLR 121.

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244. Termination of duties.

In the absence of a contractual right to terminate¹, the employment of an architect or engineer in the capacity of agent of the building owner or employer may not be determined prior to completion². The only remedy of an architect who has been dismissed without good cause is a claim for damages³, as the court will not decree specific performance of the contract of employment, because it will not compel persons against their will to maintain continuous personal and confidential relations⁴. Similarly, the court will not grant an injunction restraining the building owner from employing another architect⁵.

1 See eg *Du Bosky & Partners v Shearwater Property Holdings plc* (1991) 54 BLR 71. See also the standard form of agreement for the appointment of an architect. As to standard forms of contract see para 2 ante.

2 *Thomas v Hammersmith Borough Council* [1938] 3 All ER 203, CA; *Edwin Hill & Partners v Leakcliffe Properties Ltd* (1984) 29 BLR 43 at 68 per Hutchison J.

3 *Hickey v Browne* (1842) 4 ILR 277.

4 *Page One Records Ltd v Britton* [1967] 3 All ER 822, [1968] 1 WLR 157; cf *Hill v CA Parsons & Co Ltd* [1972] Ch 305, [1971] 3 All ER 1345, CA. See also SPECIFIC PERFORMANCE.

5 *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, [1968] 3 All ER 513, CA. See also CIVIL PROCEDURE. For the duty to appoint a second architect see para 101 ante.

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245. Liability of employer to suppliers and sub-contractors.

In general, an architect has no implied authority¹ to contract on behalf of the employer. In the absence of express authority any such purported contract is not binding upon the employer unless he with full knowledge of the facts ratifies the architect's actions².

However, the question of the liability of the building owner to builders' merchants employed to carry out work contemplated by provisional sums³ has in the past occasioned litigation. This arose generally from three causes: (1) because the builders' merchant declined to take orders from the builder or preferred to take them from the architect, and the architect, without consulting his employer, gave orders to the merchant direct; or (2) because ambiguous provisions were inserted in the contract; or (3) because of conditions empowering the architect to direct payment of these sums due to the merchant⁴. It has been held that where an architect had this power, and he certified a sum as due to a merchant and deducted it from money due to the contractor, the building owner under the particular circumstances of the case was liable to pay the merchant⁵.

A clause⁶ is sometimes inserted in the building contract, for the protection of the merchant, to the effect that, if the contractor fails to pay the supplier, the architect is to have power to authorise direct payment by the building owner to the supplier. Such a power, if exercised for a contractual reason other than insolvency, is not annulled by the contractor's insolvency, and, if the architect acts on it, the supplier may be entitled to be paid in priority to the claim of the contractor's liquidator⁷.

1 As to the architect's authority see paras 246-247 post.

2 *Vigers, Sons & Co Ltd v Swindell* [1939] 3 All ER 590.

3 For the meaning of 'provisional sums' see para 36 ante.

4 As to payment direct see para 49 ante.

5 *Hobbs v Turner* (1902) 18 TLR 235, CA.

6 Such a clause has not traditionally been regarded as creating a contractual relationship between building owner and supplier but such a provision may now give the supplier direct rights against the employer pursuant to the Contracts (Rights of Third Parties) Act 1999 (see CONTRACT).

7 *Re Wilkinson, ex p Fowler* [1905] 2 KB 713; *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178; but cf *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL; *B Mullan & Sons Contractors Ltd v Ross and London* (1996) 86 BLR 1, NI CA. See paras 49-50 ante.

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(ii) Authority as Agent

246. Extent of authority as agent.

The objects for which an architect or engineer is employed comprise the preparation of drawings and plans for the buildings or works in contemplation, and also the supervision of their construction, and he generally is the agent of the building owner or employer in both these respects¹, although his authority in dealing with the contractor may be limited by the terms of the building contract².

With regard to drawings and plans, although the architect is the agent of the building owner, he has no implied authority to warrant that they are correct, or that the work can be carried out in accordance with them, or that temporary constructional works, in the case of engineering contracts, are practicable³.

If, however, the architect makes representations as to the accuracy of plans, or as to the quantities of work to be done, or other matters within the scope of his authority, and does so fraudulently, and with the intention that they should be acted on, and they have actually been acted on to the prejudice of the contractor, then independently of the architect's own liability, the employer may be liable in respect of them⁴, and may not be able to escape liability by relying on a clause in the contract purporting to throw the onus of inquiry as to such matters on the contractor⁵. The employer will also be liable for any actionable misrepresentation similarly made by the architect on these matters⁶. The authority of the architect as agent does not empower him without the knowledge or consent of his employer to make promises that conditions contained in it will be varied or waived⁷. If there are omissions in the plans, drawings, or specifications, the architect has no implied authority to order as extras such things omitted as are necessary to complete the contract⁸, or, where the scheme is impracticable, to order as an extra work which is necessary to enable the works to be constructed⁹.

In most cases an architect has to supply detailed or working drawings during the progress of the work. This duty, however, is only to be exercised for the purpose of amplifying the work described generally in the contract plans and drawings as to be done. The architect has no authority thereby to bind the employer by authorising the contractor to deviate from the plans¹⁰, but he may, of course, have authority to do so if he also has power to vary the works.

¹ *R v Peto* (1826) 1 Y & J 37 at 54 per Alexander CB; *Wallis v Robinson* (1862) 3 F & F 307; *Kimberley v Dick* (1871) LR 13 Eq 1.

² See generally AGENCY.

³ *Thorn v London Corpn* (1876) 1 App Cas 120, HL.

⁴ But not if the architect acted outside his authority: *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, HL; cf *First Energy (UK) Ltd v HIB* [1993] 2 Lloyd's Rep 194, [1993] BCLC 1409, CA.

⁵ *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351, HL; explained in *Anglo-Scottish Beet Sugar Corpn Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; and see paras 29, 181 ante.

⁶ See the Misrepresentation Act 1967 ss 1, 2; and paras 29, 181 ante.

⁷ *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597.

8 *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597.

9 *Tharsis Sulphur and Copper Co v M'Elroy & Sons* (1878) 3 App Cas 1040, HL. As to extra work and variations generally see para 74 ante.

10 *R v Peto* (1826) 1 Y & J 37 at 54 per Alexander CB; *Cooper v Langdon* (1841) 9 M & W 60. See also para 100 ante.

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247. Authority of architect usually implied.

The contract between the employer and the contractor will usually contain provisions which define, limit or extend the authority of the architect, and this authority will not be construed so as to confer powers not necessary for the effectual exercise of the powers expressly granted¹.

Where the architect's engagement is not on standard or otherwise clear terms, his authority may not be clearly defined. Thus, where an architect is merely instructed to prepare plans, his employment is not that of an agent, and he therefore has no implied authority to obtain tenders or to negotiate for advances². However, where he has authority to obtain tenders, and if the tenders he obtains are not accepted by the building owner, it would seem that the architect is entitled to get others within the time limited, or, if time is not limited, within a reasonable time³. An authority to obtain tenders does not imply an authority to enter into a contract with a builder or contractor, even when the tender is within the price the employer is prepared to pay⁴. However, where the architect is in the salaried employment of the employer, he will have ostensible authority to enter into a contract with the builder⁵. If he does not disclose that he is acting as an agent he will be personally liable if he accepts the tender⁶.

The architect may in the absence of express authority have implied authority to employ a quantity surveyor to prepare quantities of the contemplated building or works to be used by tenderers⁷. Therefore the employer will be liable to the quantity surveyor for his fees⁸. However, an employer may expressly limit the authority of the architect to employ a quantity surveyor⁹.

In the case of engineering contracts, there is no practice as to the employment of quantity surveyors for the taking out of quantities for tenders. Many engineers take out their own quantities, and the same implied authority to employ a quantity surveyor may not exist.

If the architect or engineer has by the contract to certify the sums due to the contractor, he has implied authority to measure variations for that purpose¹⁰.

It often occurs that when tenders are obtained the lowest of them is found to be higher than the sum which the employer is willing to expend on the construction of the required works. The architect or the quantity surveyor¹¹ has then been employed to reduce the scheme or the quantities so as to make the design less costly, and to bring the expense within the amount which the employer is willing to lay out. It is doubtful whether an architect has any implied authority to employ a quantity surveyor to do this work. In any case, such an authority cannot be implied if the employer limited the authority of the architect to designing a work at a limited cost, for if the architect has disregarded his instructions by designing a building the cost of which exceeds the amount to which he was limited, he cannot charge his employer with the expense of rectifying his own mistake¹². Even in such a case, however, the employer might ratify the employment by acquiescence¹³.

¹ *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597; *Lawson v Wallasey Local Board* (1883) 48 LT 507, CA; *Frederick Betts Ltd v Pickfords Ltd* [1906] 2 Ch 87.

² Cf *Spratt v Dornford* (1862) 2 Hudson's BC (3rd Edn) 7. As to tenders see para 14 et seq ante.

³ See *Tetley v Shand* (1871) 25 LT 658; *Imperial Ottoman Bank v Cowan*, *Cowan v Imperial Ottoman Bank* (1873) 29 LT 52; *Borrowman v Free* (1878) 4 QBD 500, CA.

4 On the analogy of an estate agent see *Hamer v Sharp* (1874) LR 19 Eq 108. See AGENCY vol 1 (2008) PARA 41. See also *A Vigers Sons & Co Ltd v Swindell* [1939] 3 All ER 590.

5 *Carlton Contractors Ltd v Bexley Corp*n (1962) 60 LGR 331.

6 *Sika Contracts v Gill* (1978) 9 BLR 11.

7 See *Taylor v Hall* (1870) IR 4 CL 467 at 479 per Monahan CJ; *Young v Smith* (1879) 2 Hudson's BC (4th Edn) 70; *North v Bassett* [1892] 1 QB 333, DC. However, see also *Antisell v Doyle* (1899) 2 IR 275; *Knox and Robb v Scottish Garden Suburb Co Ltd* 1913 SC 872. As to quantity surveyors see para 311 et seq post.

8 *Moon v Witney Union Guardians* (1837) 3 Bing NC 814; *Waghorn v Wimbledon Local Board* (1877) 2 Hudson's BC (4th Edn) 52. See also *Gwyther v Gaze* (1875) 2 Hudson's BC (4th Edn) 34; *Bayley v Wilkins* (1849) 7 CB 886.

9 *Richardson v Beale* (1867) Times, 29 June. See also *Young v Smith* (1879) 2 Hudson's BC (4th Edn) 70; affd (1880) 2 Hudson's BC (4th Edn) 75.

10 *Beattie v Gilroy* (1882) 10 R 226, Ct of Sess.

11 See para 311 post.

12 *Evans v Carte* (1881) 2 Hudson's BC (4th Edn) 78, DC; and see *Nye Saunders and Partners v Bristow* (1987) 37 BLR 92, CA; cf *Copthorne Hotel (Newcastle) Ltd v Arup Associates* (1996) 58 ConLR 105, CA.

13 *Evans v Carte* (1881) 2 Hudson's BC (4th Edn) 78 at 80, DC, per Lord Coleridge CJ.

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248. Varying the contract.

The architect or engineer has no general authority to vary, waive, or dispense with any conditions contained in the contract or to vary the works without express authority to do so¹. Where he is authorised by the contract to give directions as to the manner in which the work is to be carried out, he may give only such directions as fall within the contract, and may not vary the scope of the proposed works², nor allow the substitution of entirely different materials for those specified in the contract³.

1 *R v Peto* (1826) 1 Y & J 37; *Cooper v Langdon* (1841) 9 M & W 60; *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597. As to extra work and variations generally see para 74 ante.

2 See the cases referred to in note 1 supra; and *Ramsay v Brand* (1898) 25 R 1212, Ct of Sess; *Bell v Bridlington Corp* (1908) 72 JP 453.

3 *Steel v Young* 1907 SC 360; *Forrest v Scottish County Investment Co Ltd* 1916 SC (HL) 28.

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249. Ordering of extras.

Unless there is express provision in the contract the architect may not certify work as an extra, or certify for materials as having been supplied, when in fact the work has not been done, or the materials supplied; nor has he any implied authority to order as extras items omitted from the contract which are necessary to complete the works or items necessary to convert an impracticable scheme into a viable one¹. The architect or engineer cannot waive or dispense with a condition that extras must be ordered in writing, or any similar condition². If, however, the architect has power by a final and conclusive certificate to adjust the amount payable by the employer to the contractor, the employer must pay the amount certified for if the certificate is honestly given, although the certificate may include work not done or not done properly, or materials not supplied, or extras not executed, or work which, under the terms of the contract, has been insufficiently authorised, or extras not ordered in the manner prescribed by the contract³.

¹ In the same way as shipowners are not liable on bills of lading for goods which have not been shipped: *Grant v Norway* (1851) 10 CB 665. See also *Sharpe v San Paulo Rly Co* (1873) 8 Ch App 597; *Tharsis Sulphur and Copper Co v M'Elroy & Son's* (1878) 3 App Cas 1040, HL.

² As to extra work and variations generally see para 74 ante.

³ *Goodyear v Weymouth and Melcombe Regis Corpn* (1865) 35 LJCP 12; *Connor v Belfast Water Comrs* (1871) IR 5 CL 55; *Laidlaw v Hastings Pier Co* (1874) 2 Hudson's BC (4th Edn) 13; *Lapthorne v St Aubyn* (1885) Cab & El 486; *Colbart Ltd v H Kumar* (1992) 59 BLR 89, (1992) 28 ConLR 58; *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 10 Const LJ 311, CA. For final certificates see paras 133-134 ante. As to the employer's remedies against the architect or engineer see para 264 post.

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250. Measuring variations.

If the architect or engineer is designated as the person to perform the work of measuring up variations, whether it be included or not in the work for which his remuneration is fixed, he cannot have authority from his employer to employ a quantity surveyor¹ to do the work and charge his employer. If, however, the building contract merely directs that the value of the variations is to be ascertained in some manner, without saying by whom, the architect has implied authority, at all events in any large matter, to employ a quantity surveyor to measure up². Where a quantity surveyor is employed by the architect to vindicate the correctness of his certificate, which has been questioned by the building owner, a customary authority to employ a quantity surveyor cannot be implied in such a case³. Modern forms of building contract make express provision for these matters.

1 As to quantity surveyors see para 311 et seq post.

2 *Birdseye v Dover Harbour Board Comrs* (1881) 2 Hudson's BC (4th Edn) 76 (where evidence was given of a custom that in any large matter the architect was entitled to call in a quantity surveyor, to be paid by the employer, and the jury found in favour of the custom); *Beattie v Gilroy* (1882) 10 R 226, Ct of Sess.

The scale of rates sanctioned by the Royal Institute of British Architects (see para 277 post) makes it clear that the usual remuneration by way of percentage commission on the total cost of the works is exclusive of measuring and making out extras and omissions. This scale, however, has not the force of a custom binding on the employer: *Farthing v Tomkins* (1893) 9 TLR 566. On the other hand, it would be difficult to imply that the architect would be bound to do this work in the absence of anything in the contract making it incumbent on him.

3 *Plimsaul v Lord Kilmorey* (1884) 1 TLR 48.

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(iii) Functions as a Certifier

251. Dual function of architect or engineer.

The architect or engineer may often act in two capacities in respect of the same matter. For example, he may first be acting as the agent of the building owner, and in that capacity have to decide whether work or materials are acceptable to his client, the employer, and then as certifier have to decide whether the work or materials do or do not comply with the contractual standards, whether payment should be made, or the value of the relevant work or materials, and when acting in this capacity he must act fairly and impartially between the parties¹. However, the contractor who has agreed, by entering into the contract, that the architect or engineer should discharge duties in these two capacities, cannot claim that the architect or engineer must be in the position of an independent arbitrator who has no other duty which involves acting in the interests of one of the parties; and by so acting the architect or engineer is not guilty of collusion or bad faith².

¹ *Page v Llandaff and Dinas Powis RDC* (1901) 2 Hudson's BC (4th Edn) 316; *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; cf *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 276, [1998] 2 All ER 778 at 786, HL, per Lord Hoffmann. As to the duties as a certifier see para 252 post.

² *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Co)* [1947] AC 428, HL. See also *John Holland Construction and Engineering Ltd v Majorca Products* (1996) 16 Const LJ 114, Vic SC.

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252. Duties as a certifier.

In most building contracts the architect has to perform a number of duties as a certifier as well as acting on behalf of the employer. His duties as certifier are different from his duties as agent although sometimes it is not easy to distinguish them¹.

The most obvious example of the architect's acting as a certifier is when he issues a certificate which records the value of the work executed². The architect is also acting as a certifier when he has to value variations³ or grant an extension of time⁴ or certify the date by which the work should have been completed⁵.

Whilst acting as a certifier the architect must act fairly⁶. When he is certifying, the architect is acting in an independent capacity, but it is an administrative rather than a judicial capacity⁷. There is no necessity for the architect to hear the views of both sides before he reaches his decision⁸. Whilst acting as a certifier, the architect is liable to his employer for negligence⁹. An employer has independent, concurrent and unlimited causes of action arising out of erroneous certification against both the architect and the contractor¹⁰ unless, in the case of the contractor, the certificate in question is, upon a true construction of the contract, intended to be final and conclusive¹¹.

1 See para 202 ante.

2 See para 131 ante.

3 See para 250 ante.

4 See para 69 et seq ante.

5 See para 65 et seq ante.

6 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL.

7 *Re Carus-Wilson and Greene* (1886) 18 QBD 7, CA. See *Chambers v Goldthorpe* [1901] 1 KB 624, CA; *Kennedy Ltd v Barrow-in-Furness Corp*n (1909) 2 Hudson's BC (4th Edn) 411, CA; *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, [1954] 1 WLR 963.

8 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326. As to the right to a fair trial (including the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal) under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969; ETS no 5) art 6 (now set out in the Human Rights Act 1998 s 1(3), Sch 1) see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 134.

9 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; see para 254 post. But probably not to the contractor: see *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA; *John Holland Construction and Engineering Ltd v Majorca Products* (1996) 16 Const LJ 114, Vic SC. As to what constitutes negligence in certifying see *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149. As to the liability of the architect or engineer to the contractor see paras 266-270 post.

10 *Wessex Regional Health Authority v HLM Design Ltd* (1995) 71 BLR 32.

11 *Colbart Ltd v H Kumar* (1992) 59 BLR 89, (1992) 28 ConLR 58; *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, CA. As to final certificates see paras 133-134 ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/253. Liability for want of skill.

(iv) Duties of Care and Skill

253. Liability for want of skill.

The relationship between the architect or engineer and his client is primarily contractual. Thus, the duties to be performed by the architect or engineer will principally depend upon the express or implied terms of the contract in question. However, it is clear that professionals generally owe a parallel duty and undertake a concurrent liability in tort¹. Moreover, certain duties are customarily performed by competent experienced architects and engineers².

The test of whether the architect or engineer is in breach of his duty is whether he did or did not exercise the skill and care to be expected of an ordinary architect or engineer exercising and professing to have that skill³. Although in general the duty of an architect or engineer is only to exercise reasonable skill and care, a higher duty may exceptionally be imposed, for example if the circumstances show that it was the common intention of the parties that the architect or engineer design a building which would be fit for its purpose⁴. It is evidence of ignorance and lack of skill that the architect or engineer has acted contrary to the established practices that are universally recognised by members of the profession⁵. It is not sufficient to establish a breach of duty to show that another architect or engineer of greater experience and ability might have used a greater degree of skill or care⁶.

When an architect or engineer is employed upon works which involve the use of some new invention of which he has no knowledge and with which he has not professed any acquaintance, his failure may not make him liable for want of skill⁷. Where the directions of the employer are capable of more than one meaning and the architect or engineer honestly and carefully, but erroneously, adopts the one which his employer did not intend, he will not be liable⁸.

1 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL. See also *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership (a firm)* [1993] 3 All ER 467, 65 BLR 21; *Wessex Regional Health Authority v HLM Design* (1994) 10 Const LJ 165. The existence of this concurrent liability may have important consequences in relation to limitation of actions: see para 184 ante; and LIMITATION PERIODS.

2 See, in relation to such duties, *Hudson's Building and Engineering Contracts* (11th Edn, 1995) p 283 et seq. Engineers customarily perform similar duties in relation to engineering contracts. See further paras 255-263 post.

3 See the dicta of McNair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121, [1957] 1 WLR 582 at 586, which has been generally approved; *Hawkins v Chrysler (UK) Ltd and Byrne Associates* (1986) 38 BLR 36, CA (also dealing with *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99, [1975] 1 WLR 1095, CA); and see *Nye Saunders and Partners (a firm) v AE Bristow* (1987) 37 BLR 92, CA; *Eckersley v Binnie & Partners* (1988) 18 ConLR 1 at 80, CA, per Bingham LJ; *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* [2001] BLR 99, CA.

4 See *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99, [1975] 1 WLR 1095, CA; cf *George Hawkins v Chrysler (UK) Ltd* (1986) 38 BLR 36, CA.

5 *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99, [1975] 1 WLR 1095, CA; *George Hawkins v Chrysler (UK) Ltd* (1986) 38 BLR 36, CA; *Gloucestershire Health Authority v MA Torpy & Partners Ltd* (1997) 55 ConLR 124.

6 See *Slater v Baker* (1767) 2 Wils 359. In *Worboys v Acme Investment Ltd* (1969) 210 Estates Gazette 335, (1969) 4 BLR 133, CA, an architect was held not to be negligent in omitting downstairs lavatories in houses then valued at £8,000, in the absence of professional evidence that he had failed to exercise due care.

7 *Wimpey Construction UK Ltd v Poole* (1984) 27 BLR 58; *Merton London Borough Council v Lowe* (1981) 18 BLR 130, CA.

8 *Bulmer v Gilman* (1842) 4 Man & G 108; *Ireland v Livingstone* (1872) LR 5 HL 395; *Cotton v Wallis* [1955] 3 All ER 373, [1955] 1 WLR 1168, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/254. Duty of care as regards negligence.

254. Duty of care as regards negligence.

In addition to his liability to the client, an architect or engineer is in general also liable to anybody else who is sufficiently proximate and who suffers loss or damage by reason of his negligence¹. Thus, a negligent architect or engineer would be liable for physical injury to a third party's person or property² but would not, absent special circumstances, be liable for economic loss³ suffered by such a third party. A defective design will also give rise to liability, even where the design's construction had been undertaken by a sub-contractor⁴.

1 See generally NEGLIGENCE. As to liability under the Defective Premises Act 1972 see paras 77-79 ante. As to failure to comply with building control see para 104 et seq ante. See also *Clay v AJ Crump & Sons Ltd* [1964] 1 QB 533, [1963] 3 All ER 687, CA (liability for injury to labourer); *Eckersley v Binnie & Partners* (1988) 18 ConLR 1, CA (engineers liable to visitors); cf *Oldschool v Gleeson (Construction) Ltd* (1976) 4 BLR 103. As to liability to the contractor see paras 266-270 post.

2 See eg *Baxall Securities Ltd v Sheard Walshaw Partnership (a firm)* [2001] BLR 36, (2000) 74 ConLR 116; revsd on the facts [2002] EWCA Civ 09, [2002] 05 EG 130 (CS).

3 For examples of cases where architects were not held to be liable for economic loss see *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership (a firm)* [1993] 3 All ER 467; *Machin v Adams* (1997) 84 BLR 79, CA. See also para 166 ante; and NEGLIGENCE vol 78 (2010) PARA 42.

4 *Baxall Securities Ltd v Sheard Walshaw Partnership (a firm)* [2001] BLR 36, (2000) 74 ConLR 116; revsd on the facts [2002] EWCA Civ 09, [2002] 05 EG 130 (CS).

UPDATE

254 Duty of care as regards negligence

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--An engineer has a duty of care in relation to observed dangers which relate to work outside his immediate contractual responsibility: *Hart Investments v Fidler* [2007] EWHC 1058 (TCC), (2007) 112 ConLR 33.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/255. Compliance with statutes, byelaws and other legal requirements.

255. Compliance with statutes, byelaws and other legal requirements.

It is part of the duty of an architect or engineer to ascertain and to comply with the requirements of all relevant public and local statutes and with all subsidiary legislation¹, such as byelaws and the building regulations², made under them³. Ignorance or disregard of the legal requirements as to buildings may result not only in a fine on the employer, but also in an order for the whole or part of the building to be pulled down⁴, and the architect or engineer would be liable to his employer for the loss so incurred⁵.

The knowledge of the law which an architect or engineer is expected to have is not a minute and accurate knowledge, but a knowledge of the general rules of law applicable to the exercise of his profession⁶. The architect or engineer should, however, have a general knowledge of the law as applied to the more important clauses, at least, of standard forms of building contract⁷.

Failure on the part of the architect or engineer to submit plans to the proper authorities, or to give the notices required by law, may involve the employer in penalties, and even if the contractor has undertaken to give all the necessary notices, it would seem that it is still the duty of the architect or engineer in supervising the work to see that the contractor does so, at any rate in so far as the notices are building notices, or on the contractor's default to do so himself or inform his employer. Where a judicial decision has altered what was previously supposed to be the law affecting a particular profession, it seems to be the duty of persons practising that profession to acquaint themselves within a reasonable time with the effect of such a decision and to act accordingly in the exercise of their profession⁸. If the employer, however, knowingly instructs the architect to design a building which will contravene the law, the architect will incur no liability to the employer; but on the other hand, it would seem that he would not be able to recover any fees for supervision because a contract to build in contravention of statute is illegal⁹.

1 *BL Holdings Ltd v Robert J Wood & Partners* (1978) 10 BLR 48; revsd on other grounds (1979) 12 BLR 1, (1979) 123 Sol Jo 570, CA.

2 As to the building regulations see BUILDING.

3 As to the requirements contained in statutes, regulations and byelaws see eg paras 77 et seq, 104-105, 190 et seq ante. See also *BL Holdings Ltd v Robert J Wood & Partners* (1978) 10 BLR 48; revsd on other grounds (1979) 12 BLR 1, (1979) 123 Sol Jo 570, CA.

4 See *Hopkins v Smethwick Local Board* (1890) 59 LJQB 250, CA; and BUILDING.

5 On the principle of *Hadley v Baxendale* (1854) 9 Exch 341 at 354 per Alderson B see DAMAGES vol 12(1) (Reissue) para 1015. See also *Townsend's (Builders) Ltd v Cinema News and Property Management Ltd (David A Wilkie & Partners, third party)* [1959] 1 All ER 7, [1959] 1 WLR 119, 20 BLR 118, CA.

6 *Jenkins v Betham* (1855) 15 CB 168 at 189 per Jervis CJ.

7 *West Faulkner Associates v Newham London Borough Council* (1994) 71 BLR 1 at 15-16, CA, per Simon Brown LJ.

8 See *Lee v Walker* (1872) LR 7 CP 121.

9 *Young v Buckles* [1952] 1 KB 220, [1952] 1 All ER 354, CA (architect's fees attributable to work within amount licensed under Defence Regulations held recoverable where the total cost of works exceeded that

amount and were to that extent illegal). See also *Stevens v Gourley* (1859) 7 CBNS 99 (contravention of the Metropolitan Building Act 1855, since repealed).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/256. Interference with private rights.

256. Interference with private rights.

As regards private rights, the architect or engineer should inquire from his employer as to the existence of any easements or restrictions affecting the site, and must in the preparation of his design avoid infringing them¹. The employer owes a duty to his neighbours not to infringe their rights, and cannot so delegate the execution of building operations to a contractor as to relieve himself from that obligation².

The architect or engineer may render himself liable to an adjoining owner by preparing plans and supervising work which necessitates a trespass on the adjoining owner's land³.

1 *Kellett v York Corpn* (1894) 10 TLR 662 at 663; *Armitage v Palmer* (1960) 175 Estates Gazette 315, CA. See also EASEMENTS AND PROFITS A PRENDRE.

2 *Bower v Peate* (1876) 1 QBD 321; *Hughes v Percival* (1883) 8 App Cas 443, HL; *Jolliffe v Woodhouse* (1894) 10 TLR 553, CA. See further NEGLIGENCE vol 78 (2010) PARA 39.

3 *Monks v Dillon* (1882) 12 LR Ir 321. As to trespass see TORT vol 97 (2010) PARA 562 et seq.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/257. Failure to examine site, foundations, etc.

257. Failure to examine site, foundations, etc.

If an architect or engineer fails to exercise reasonable care in the examination of the site on which the works are to be constructed, and does not ascertain the circumstances affecting it, such as the nature of the soil and strata, the existence and condition of buildings, whether there are rights of way or of light and air, or other easements affecting it, and consequently his designs are defective or impracticable, he may be liable to the employer for any loss occasioned to him thereby¹; and the fact that the builder or contractor is liable to the employer under a contract to construct the works, notwithstanding the defective designs, will not necessarily exonerate the architect or engineer, the employer having a double remedy and being entitled to bring a claim against either the architect (or engineer) or the builder, or against them both².

1 *Money Penny v Hartland* (1826) 2 C & P 378; *Columbus Co v Clowes* [1903] 1 KB 244; *EH Cardy & Son Ltd v Taylor and Paul Roberts and Associates* (1994) 38 ConLR 79. In *Moss v Heckingbottom* (1958) 172 Estates Gazette 207, Barry J assessed damages for an architect's negligent survey of property which failed to reveal substantial defects, by calculating the difference between the purchase price and the actual value of the property with the defects that should have been discovered at the date of the purchase. See also *Rayment v HG Needham & Son* (1953) 163 Estates Gazette 4; *affd* (1954) 163 Estates Gazette 542, CA (dry rot).

2 *Brown v Laurie* (1854) 5 LCR 65 (Que); *Hutchinson v Harris* (1978) 10 BLR 19, CA; *Townsend v Stone Toms & Partners (a firm)* (1984) 27 BLR 26, CA; *Merton London Borough Council v Lowe* (1981) 18 BLR 130, CA; *Wessex Regional Health Authority v HLM Design Ltd* (1995) 71 BLR 32; and see para 62 et seq ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/258. Drawings and specifications.

258. Drawings and specifications.

A breach of duty by an architect or engineer in respect of drawings and specifications may arise either through the drawings or specifications being defective or incomplete, or through their not being supplied to the contractor either in proper time or at all¹.

The design of a building or of works may be defective or incomplete, for example: (1) as not being in accordance with the art and science of architecture, or as being opposed to sound principles of building or engineering²; (2) as not being in accordance with the instructions of the employer; (3) as contravening statutes and byelaws³; (4) as disregarding restrictions imposed on the use of the land, either by public or by private rights⁴; (5) as involving the specification of unsuitable materials⁵; and (6) as failing to achieve the necessary degree of lettable space on redevelopment of a building⁶.

The mere approval of the plans and specifications by the employer will not exonerate the architect or engineer from liability when the design of the works is structurally defective or does not carry out the instructions of the employer, even though the employer has been told by the architect or engineer to examine them⁷, unless the client is an experienced developer⁸.

1 Failure to specify design requirements to a sub-contractor, resulting in the use of an inadequate design, will give rise to liability: *Baxall Securities Ltd v Sheard Walshaw Partnership (a firm)* [2001] BLR 36, (2000) 74 ConLR 116; revsd on the facts [2002] EWCA Civ 09, [2002] 05 EG 130 (CS).

2 For example in that the design is not 'buildable' (see *Equitable Debenture Assets Corp Ltd v William Moss Group Ltd* (1984) 2 ConLR 1) or is over-designed (see *London Underground Ltd v Kenchington Ford plc* (1998) 63 ConLR 1).

3 See *Townsend's (Builders) Ltd v Cinema News and Property Management Ltd (David A Wilkie & Partners, third party)* [1959] 1 All ER 7, [1959] 1 WLR 119, 20 BLR 118, CA. See also para 255 ante.

4 As to private rights see para 256 ante.

5 See *Sealand of the Pacific v Robert C McHaffie Ltd* (1974) 51 DLR (3d) 702, British Columbia CA; *Richard Roberts Holdings Ltd v Douglas Smith Stimson Partnership* (1988) 46 BLR 50, 6 Const LJ 71.

6 See *Gable House Estates Ltd v The Halpern Partnership* (1995) 48 ConLR 1.

7 *Smith v Barton* (1866) 15 LT 294 (valuer). See also *Rayment v HG Needham & Son* (1953) 163 Estates Gazette 4; affd (1954) 163 Estates Gazette 542, CA, where an architect was held not liable for failing to provide sufficient ventilation in a cellar to prevent the spread of dry rot.

8 *Worboys v Acme Investments Ltd* (1969) 210 Estates Gazette 335, (1969) 4 BLR 133, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/259. Failure or delay in supplying drawings, etc.

259. Failure or delay in supplying drawings, etc.

The design duties of the architect or engineer do not end when the work starts. There is a continuing duty to check that the design will work in practice and to correct any errors that may emerge¹. The architect or engineer is also usually subject to a duty to supply further necessary information to the contractor.

Where, by reason of a failure or delay in the supplying of drawings or details, the contractor becomes entitled to rescind the contract altogether, or is released from his obligation to complete the works within the specified time, or is entitled to claim against the employer², the architect or engineer may become liable to his employer for the loss incurred by him³, and part of such loss may be the loss of the rent or profit which would have been derived from the building or the loss of interest on his money⁴.

¹ *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862, CA; *Merton London Borough Council v Lowe* (1981) 18 BLR 130, CA; *Chelmsford District Council v Evers* (1983) 25 BLR 99.

² See eg *Royal Brompton Hospital National Health Trust v Hammond* [2000] BLR 75, sub nom *Royal Brompton Hospital National Health Trust (No 4)* (1999) 69 ConLR 170.

³ This is on the principle of *Hadley v Baxendale* (1854) 9 Exch 341 at 354 per Alderson B. See also para 264 post; and DAMAGES vol 12(1) (Reissue) para 1015.

⁴ See *The Marpessa* [1906] P 95, CA; affd [1907] AC 241, HL; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/260. Duty as to estimates and quantities.

260. Duty as to estimates and quantities.

Where the architect or engineer is required to give an estimate of the cost of proposed work, the estimate should be careful¹ and give appropriate warnings as to inflation². However, the fact that the eventual cost exceeds the estimate is not of itself sufficient to establish a breach of duty³.

If the architect himself takes out the quantities, and does so negligently or unskilfully so as to make them greater than they should be, thus increasing the price, he will be in breach of duty and therefore liable to his employer⁴ if the terms of the contract between builder and building owner are such that the excess cannot be taken into account and deducted from the money due to the builder.

1 *Money Penny v Hartland* (1826) 2 C & P 378.

2 *Nye Saunders and Partners (a firm) v Alan E Bristow* (1987) 37 BLR 92, CA.

3 *Copthorne Hotel (Newcastle) Ltd v Arup Associates* (1996) 58 ConLR 105.

4 See *M'Connell v Kilgallen* (1878) 2 LR Ir 119 at 121. As to a quantity surveyor's liability under similar circumstances see para 312 post.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/261. Duty when recommending the acceptance of a tender.

261. Duty when recommending the acceptance of a tender.

An architect or engineer does not warrant the solvency or capability of a builder or contractor whose tender is accepted, but he is bound to give his employer the benefit of any information he may have in respect to such solvency or capability, and not to allow his employer to enter blindly into a contract with a person whom he has any reason to suspect of being unreliable¹. And it would seem that, in some circumstances, he might be liable for not making reasonable inquiries².

1 *Pratt v Hill* (1987) 38 BLR 25, CA.

2 See *Heys v Tindall* (1861) 1 B & S 296; *Mutual Life and Citizens Assurance Co Ltd v Evatt* [1971] AC 793, [1971] 1 All ER 150, PC; *Partridge v Morris* (1995) CILL 1095; and NEGLIGENCE vol 78 (2010) PARA 14. As to tenders see para 14 et seq ante.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(iv) Duties of Care and Skill/262. Duty as to supervision and administration.

262. Duty as to supervision and administration.

Although an architect or engineer is not expected to be constantly on the site and to supervise every detail, it is not sufficient for him to pay occasional visits and to get any defects which he may happen to notice set right; his duty is to give such an amount of supervision as will enable him to give an honest certificate whether or not the work has been done in accordance with the contract¹. Moreover, although his supervision may be partially, as to matters of detail, entrusted to subordinates such as clerks of works or inspectors, the architect or engineer cannot exonerate himself by saying that the negligence was theirs².

Depending upon the express terms of the relevant engagements, the duties of an architect or engineer may include a duty to advise or warn the employer of deficiencies in his own performance or that of other members of the professional team³.

The failure of the architect or engineer to discover at the time that the work done or materials supplied are not up to the standard of the contract may involve the employer in loss, where the employer's rights against the contractor are limited to having such defects made good as were ascertainable at some particular time⁴ or where a final certificate has been issued and has become conclusive⁵ or where the contractor is insolvent. The loss to the employer, due to the architect's or engineer's negligence in such a case, may be the difference between the amount for which the builder or contractor is actually liable and the whole cost of the repairs, or the whole expense of rectifying the defects⁶.

An architect or engineer is obliged in administering a contract to deploy sufficient knowledge of those principles of law relevant to his professional practice in order reasonably to protect his client from damage and loss⁷. Thus an architect has been held liable in damages for failing to give notice under a building contract in relation to a contractor who did not proceed regularly and diligently⁸.

1 *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406 at 443, [1965] 3 All ER 619 at 636, HL, per Lord Upjohn; and see *Florida Hotels Pty Ltd v Mayo* (1965) 113 CLR 588; *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149; *Gray (Special Trustees of the London Hospital) v TP Bennett & Son* (1987) 43 BLR 63; *Alexander Corfield v David Grant* (1992) 59 BLR 102, sub nom *Grant v Corfield* (1992) 29 ConLR 58n. See also, for older cases on this point, *Jameson v Simon* (1899) 1 F 1211, Ct of Sess; *Leicester Guardians v Trollope* (1911) 75 JP 197. As to certificates see para 125 et seq ante.

2 *Armstrong v Jones* (1869) 2 Hudson's BC (4th Edn) 6; *Leicester Guardians v Trollope* (1911) 75 JP 197. In *Cotton v Wallis* [1955] 3 All ER 373, [1955] 1 WLR 1168, CA, the court thought that the low price of a building was a material factor in determining whether an architect should have passed work as having been done to his reasonable satisfaction. As to the clerk of works see para 6 ante.

3 *Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd* (1996) 82 BLR 92, (1996) 53 ConLR 22.

4 *Re Trent and Humber Co, ex p Cambrian Steam Packet Co* (1868) LR 6 Eq 396. See, however, *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406 at 443, [1965] 3 All ER 619 at 636, HL, per Lord Upjohn, and at 449, 639 per Lord Pearson.

5 See *Crown Estate Comrs v John Mowlem & Co Ltd* (1994) 70 BLR 1, (1994) 10 Const LJ 311, CA.

6 See further para 172 et seq ante.

7 *West Faulkner Associates v Newham London Borough Council* (1994) 71 BLR 1 at 15, (1994) 11 Const LJ 157 at 162, CA, per Simon Brown LJ.

8 *West Faulkner Associates v Newham London Borough Council* (1994) 71 BLR 1, (1994) 11 Const LJ 157, CA.

UPDATE

262 Duty as to supervision and administration

NOTE 1--See also *McGlinn v Waltham Contractors Ltd (No 3)* [2007] EWHC 149 (TCC), [2008] Bus LR 233.

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263. Duty as regards certificates and measurements.

When issuing certificates or carrying out measurements or valuations the architect or engineer is liable to the employer for any negligent measurement or valuation of work done¹. In performing the function of certifier, the architect or engineer is not immune from suit². An employer has independent, concurrent and unlimited causes of action for over-certification against both the contractor and the architect or engineer³. If, for example, the architect or engineer should negligently or unskilfully overestimate the amount of an interim certificate⁴, the employer might, in the event of the builder or contractor becoming bankrupt, have to complete the work at his own expense, and so lose the amount by which the builder has been overpaid⁵.

1 *Saunders and Collard v Broadstairs Local Board* (1890) 2 Hudson's BC (4th Edn) 164, DC; and see NEGLIGENCE vol 78 (2010) PARAS 14, 21 et seq.

2 *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL.

3 *Wessex Regional Health Authority v HLM Design Ltd* (1995) 71 BLR 32.

4 As to interim certificates see para 130 ante.

5 In *Irving v Morrison* (1877) 27 CP 242, Ont CA, an architect was held to be liable to his employer for the amount of the loss so occasioned. See also *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149; and cf *Wisbech RDC v Ward* [1928] 2 KB 1, CA.

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(v) Liabilities

A. LIABILITY TO THE EMPLOYER

264. Rights of employer on default of architect or engineer.

If the architect or engineer is dismissed for failing to act with due care in his duties of design or supervision, he will forfeit either wholly or in part his right to remuneration, as a person who holds himself out as skilled in any art cannot recover for services which are useless, and which by the ordinary exercise of reasonable skill he ought to have known would be useless for the object in respect of which he was employed¹. In addition to this, if the negligence or want of skill of the architect or engineer has occasioned loss to his employer, he will be liable to the latter in damages². These are not limited to the amount of the remuneration which under the agreement the architect or engineer was to receive, but are measured by the actual loss occasioned to the employer³. The employer can set up such a claim for damages as a defence to a claim by the architect or engineer for his fees, as well as by way of counterclaim or in a separate claim for damages⁴.

1 *Money Penny v Hartland* (1826) 2 C & P 378. As to an architect's or engineer's duty of care see paras 253-263 ante. See also AGENCY vol 1 (2008) PARA 78 et seq.

2 *Gordon v Millar* (1839) 1 D 832, Ct of Sess; *Armstrong v Jones* (1869) 2 Hudson's BC (4th Edn) 6; *Ellisen v Lawrie* (1878) Times, 19 February; *Rogers v James* (1891) 56 JP 277, CA; *Leicester Guardians v Trollope* (1911) 75 JP 197. See also *West Faulkner Associates v Newham London Borough Council* (1994) 71 BLR 1, CA (architect's liability in damages for failing to give notice to contractors who did not proceed regularly and diligently). The liability will, in principle, be both in contract and in tort: see para 253 ante. See generally DAMAGES.

3 *Saunders and Collard v Broadstairs Local Board* (1890) 2 Hudson's BC (4th Edn) 164.

4 *Davis v Hedges* (1871) LR 6 QB 687; *Mondel v Steel* (1841) 8 M & W 858; *Armstrong v Jones* (1869) 2 Hudson's BC (4th Edn) 6; *Saunders and Collard v Broadstairs Local Board* (1890) 2 Hudson's BC (4th Edn) 164; *Rogers v James* (1891) 56 JP 277, 2 Hudson's BC (4th Edn) 172, CA; *A Martin French v Kingswood Hill Ltd* [1961] 1 QB 96, [1960] 2 All ER 251, CA. But not both as a defence and as a counterclaim: *Hutchinson v Harris* (1978) 10 BLR 19, CA. See also DAMAGES; CIVIL PROCEDURE.

UPDATE

264 Rights of employer on default of architect or engineer

NOTE 3--Where an architect, who has no direct part in the decision-making process, fails to warn his employer about matters falling within his brief, he is liable only for the foreseeable consequences of his failure to warn his employer: *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2002] EWHC 3094 (TCC), [2003] BLR 155.

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265. Liability for fraud and secret commissions.

Any fraudulent or dishonest act on the part of an architect or engineer in relation to his employment will render him liable to his employer, who may rescind the contract and, if he has suffered loss, claim damages¹. In particular such liability will arise if the architect (or engineer) receives a secret commission from the builder² and whether such act results in loss to the employer or not it justifies the dismissal of the architect or engineer, who must pay over any money so received to the employer, for an agent cannot retain secret profits made at his principal's expense³. Nor will the courts listen to any evidence of custom or usage of agents to take such secret commissions⁴. Any such payments received by the architect from the builder, if made without the knowledge of the employer, are a breach of the right of the employer to demand the faithful services of the architect or engineer to the exclusion of any arrangement with persons whose work he has to supervise⁵.

It is an offence to offer, ask or give or receive any consideration for an agent's doing or forbearing to do any act in relation to the business of his principal⁶, but secret commission cannot be recovered from the builder as the consideration for the contract to pay is corrupt⁷.

1 See generally MISREPRESENTATION AND FRAUD. See also DAMAGES.

2 *Temperley v Blackrod Manufacturing Co Ltd* (1907) 71 JP Jo 341. See also para 28 ante.

3 *Rogers v James* (1891) 56 JP 277, CA; *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543; and see AGENCY vol 1 (2008) PARA 91 et seq.

4 *Bulfield v Fournier* (1894) 11 TLR 62 per Lord Russell of Killowen CJ. See, however, *Holden v Webber* (1860) 29 Beav 117. As to custom and usage see generally CUSTOM AND USAGE.

5 See *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

6 See the Prevention of Corruption Act 1906 s 1(1) (amended by the Criminal Justice Act 1988 s 47(2), (3)); the Prevention of Corruption Act 1916 s 2; the Criminal Law Act 1967 s 1; and CRIMINAL LAW, EVIDENCE AND PROCEDURE.

7 *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

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B. LIABILITY TO THE CONTRACTOR

266. Liability of architect or engineer to the contractor.

As there is no contractual relationship between the architect or engineer and the contractor the only liability that can be incurred towards the contractor is in tort. In situations recognised by law a liability might arise in negligence¹, negligent misstatement², negligent misrepresentation³ and other torts⁴. It appears, however, that an architect or engineer will not generally be liable to the contractor for economic loss caused by the performance of the certifying function⁵. When the architect or engineer is acting as agent for the employer he can incur no personal liability provided that he acts honestly and within the scope of his employment⁶.

If an architect or engineer exceeds his authority in ordering additional works of the contractor for which the contractor could claim no remuneration under his contract with the employer, he may incur liabilities towards the contractor for breach of warranty of authority⁷, but as such unauthorised acts would not normally bind his employer, it would seem that he could not incur any liability towards his employer⁸ in respect of them. If the architect or engineer has apparent or ostensible authority to order additional work, the contractor can claim payment for the work and the architect or engineer would incur a liability to the employer, unless it is apparent from the contract that such work was unauthorised⁹. Moreover the architect or engineer will not be liable to pay a contractor¹⁰ or supplier¹¹ himself, unless he has specifically undertaken personal liability¹².

1 See para 166 ante; and NEGLIGENCE.

2 See *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd* [2001] NPC 15, CA; cf *South Nation River Conservation Authority v Auto Concrete Curb Ltd* (1993) 11 Const LJ 155, Can SC.

3 See *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 66 BLR 56, Can SC.

4 *John Mowlem & Co plc v Eagle Star Insurance Co Ltd* (1992) 62 BLR 126, (1992) 33 ConLR 131.

5 *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA; *John Holland Construction and Engineering Ltd v Majorca Products* (1996) 16 Const LJ 114, Vic SC.

6 See *Ambrose v Dunmow Union* (1846) 9 Beav 508 at 515; *Robertson v Fleming* (1861) 4 Macq 167 at 184, HL; *Stevenson v Watson* (1879) 4 CPD 148. As to his liability to his employer see para 264 ante.

7 See AGENCY vol 1 (2008) PARAS 160-161; and *Randell v Trimen* (1856) 18 CB 786; *Collen v Wright* (1857) 8 E & B 647; *Yonge v Toynbee* [1910] 1 KB 215, CA. Cf *Howard v Sheward* (1866) LR 2 CP 148.

8 See paras 74, 249 ante.

9 *Halbot v Lens* [1901] 1 Ch 344. Any fraudulent assertion of authority would be actionable on grounds of deceit or misrepresentation: *Ludbrook v Barrett* (1877) 46 LJB 798; *Stevenson v Watson* (1879) 4 CPD 148; see para 269 post.

10 See *Chidley v Norris* (1862) 3 F & F 228; and AGENCY vol 1 (2008) PARA 157.

11 *Beigtheil and Young v Stewart* (1900) 16 TLR 177. Where the supplier has received an order from the architect it is a question of fact whether the architect is personally liable: see *A Vigers & Sons Ltd v Swindell* [1939] 3 All ER 590.

12 *Sika Contracts v Gill* (1978) 9 BLR 11.

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267. No warranty that plans are practicable.

An architect or engineer does not warrant to the builder or contractor the practicability of the plans, drawings and specifications prepared by him, or of the temporary means of construction indicated in the specification. It is the duty of the contractor to investigate these matters for himself, and it has been held that any usage or custom¹ for him to rely on the drawings or specifications will not assist him². If he does not inquire into the matter he runs the risk of not being able to carry out the work, and must take the consequences³.

1 See generally CUSTOM AND USAGE.

2 *Thorn v London Corpn* (1876) 1 App Cas 120, HL. See paras 17, 112-113 ante.

3 *Bottoms v York Corpn* (1892) 2 Hudson's BC (4th Edn) 208, CA. See also *Jackson v Eastbourne Local Board* (1886) 2 Hudson's BC (4th Edn) 81, HL.

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268. Accuracy of bills of quantities.

The architect or engineer does not normally warrant the correctness of the bills of quantities¹ supplied to the persons who propose to tender, whether they have been prepared by an independent quantity surveyor or by the architect or engineer himself².

The liability for inaccurate quantities prepared by the architect or engineer rests on the same principle as where they are prepared by an independent quantity surveyor. If the architect or engineer is employed by the contractor, he may of course be liable to him for negligence in their preparation³. In a case where the architect had been employed by the building owner to prepare the quantities, and the amount of his charges was to be added to the amount of the tender, the payment by the builder of those charges did not impose any more liability on the architect than it did in the case of an independent quantity surveyor⁴.

If, however, the architect or engineer expressly makes himself responsible to the builder or contractor for the accuracy of the quantities⁵, or if a duty of care were to be imposed on the architect or engineer towards the contractor by virtue of the particular circumstances of the case⁶, he will be liable to compensate him if the quantities are not reasonably accurate.

¹ See para 246 ante.

² *Sherren v Harrison* (1860) 2 Hudson's BC (4th Edn) 5; *Scrivener v Pask* (1866) LR 1 CP 715. See also para 263 ante.

³ See *Priestley v Stone* (1888) 4 TLR 730, CA.

⁴ *Young v Blake* (1887) 2 Hudson's BC (4th Edn) 110.

⁵ *Bolt v Thomas* (1859) 2 Hudson's BC (4th Edn) 3.

⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *Henderson v Merrett Syndicates* [1995] 2 AC 145, HL. See generally para 267 ante. For examples of cases where claims of this kind have been advanced against an architect or engineer see *South Nation River Conservation Authority v Auto Concrete Curb Ltd* (1993) 11 Const LJ 155, Can SC; *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 66 BLR 56, Can SC; *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd* [2001] NPC 15, CA. As to fraud see *S Pearson & Son Ltd v Dublin Corp'n* [1907] AC 351, HL; and para 269 post.

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269. Liability for fraud.

An architect or engineer will be liable to the contractor if he acts fraudulently to the contractor's detriment, whether in preparing drawings¹ or in refusing to certify or in certifying dishonestly and whether in collusion with his employer or not². He will similarly be liable if fraudulently he falsely asserts that he has authority to order additional work³.

The architect cannot excuse himself from liability for fraud by alleging that he merely acted as the agent of his employer, for all persons directly concerned in the commission of a fraud are to be treated as principals, and a contract of agency cannot impose any obligation on the agent to commit a fraud⁴.

The mere fact of an architect refusing to certify or to ascertain the amount owing⁵ is no proof of fraud, nor is the fact that measurements made by him for the purpose of valuation are inaccurate, or made on a wrong principle.

1 *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351, HL.

2 *Waring v Manchester, Sheffield and Lincolnshire Rly Co* (1850) 2 H & Tw 239; *Macintosh v Great Western Rly Co* (1850) 19 LJCh 374; *Padley v Lincoln Waterworks Co* (1850) 2 Mac & G 68; *Scott v Liverpool Corp* (1858) 3 De G & J 334; *Goodyear v Weymouth and Melcombe Regis Corp* (1865) 35 LJCP 12 at 17; *Ludbrook v Barrett* (1877) 46 LQB 798; *Re De Morgan, Snell & Co and Rio de Janeiro Flour Mills and Granaries Ltd* (1892) 8 TLR 292 at 293, CA.

3 *Ludbrook v Barrett* (1877) 46 LQB 798; *Stevenson v Watson* (1879) 4 CPD 148.

4 *Cullen v Thomson's Trustees and Kerr* (1862) 4 Macq 424 at 432, HL.

5 *Stevenson v Watson* (1879) 4 CPD 148; *Le Lievre v Gould* [1893] 1 QB 491, CA.

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270. Measure of damages.

The measure of damages in case of breach of warranty of authority seems to be the amount that will indemnify the contractor and put him in the same position as if the act of the architect or engineer had been within his authority¹. Thus the contractor would be entitled to recover the amount that would have been recoverable from the alleged principal and the costs² which he has had to pay in the course of any litigation caused by the breach of warranty of authority³. If the warranty is fraudulent, the architect will be open to a claim for deceit⁴.

1 *Richardson v Williamson* (1871) LR 6 QB 276 at 279 per Blackburn J; *Re National Coffee Palace Co, ex p Panmure* (1883) 24 ChD 367, CA; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1043 per Devlin J; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA.

2 These costs will be those assessed costs which the contractor has paid to the principal and to his own solicitor: see *Hughes v Graeme* (1864) 33 LJ QB 335. As to costs see generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

3 *Randell v Trimen* (1856) 18 CB 786; *Collen v Wright* (1857) 8 E & B 647; *Simons v Patchett* (1857) 7 E & B 568; *Meek v Wendt* [1889] WN 14, CA; *Yonge v Toynbee* [1910] 1 KB 215, CA; *Irving v Burns* 1915 SC 260. See further AGENCY vol 1 (2008) PARAS 160-161.

4 As to deceit see *Derry v Peek* (1889) 14 App Cas 337, HL; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA; *Smith Kline & French Laboratories Ltd v Long* [1989] 1 WLR 1, CA; and MISREPRESENTATION AND FRAUD.

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(vi) Remuneration of Architect or Engineer

A. IN GENERAL

271. Person liable to pay.

An architect or engineer is ordinarily employed by the building owner, and has to look to him for payment¹.

Where the building contract gives power to vary the works specified, and provides that additions or omissions due to such variations are to be measured by the architect so as to ascertain the amount to be added to or deducted from the contract price, the building owner may be liable to pay the architect for this service, if it falls outside the architect's original engagement and the building owner is aware that it is an additional service².

If a lessee is under a covenant with his lessor to do repairs to the satisfaction of the lessor's architect, such architect's certificate is part of the title, and must be obtained if required by a purchaser of the lease at the vendor's expense³.

1 *Locke v Morter* (1885) 2 TLR 121. In certain circumstances, the architect or engineer may have rights against others by reason of the Contracts (Rights of Third Parties) Act 1999: see CONTRACT. As to payment provisions where the contract is a 'construction contract' within the meaning of the Housing Grants, Construction and Regeneration Act 1996 see paras 154-160 ante.

2 *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248, 4 BLR 9, CA; *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA.

3 *Re Moody and Yates's Contract* (1885) 30 ChD 344, CA; and see LANDLORD AND TENANT.

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272. Express or implied contract.

If the employer has entered into an express contract, whether oral or in writing, with the architect or engineer, the remuneration of the latter will necessarily be governed by the terms of that contract. If the architect or engineer enters into an express contract for a lump sum with the employer, he cannot charge an additional fee for extra work undertaken within the scope of that engagement by him unless the express contract is discharged and a new contract made¹.

Where no express contract has been entered into as to the terms of the employment of an architect or engineer, the right to remuneration rests on a contract to pay what is reasonable, implied by requesting and accepting the services² or by inducing the architect by fraud to perform them without intending to pay for them³.

Where the agreement is that the employer is to decide how much the remuneration is to be, the architect or engineer need not accept the amount fixed by the employer, but is entitled to a reasonable remuneration such as the employer ought to have fixed⁴.

If the contract does not specifically provide for payment, evidence is admissible to show that the parties intended the services to be gratuitous, or that payment was only to be made in the discretion of the employer⁵.

1 *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248, 4 BLR 9, CA, applying the principle stated by Lord Dunedin in *The Olanda* [1919] 2 KB 728n at 730, HL. See also *Adams Holden & Pearson v Trent Regional Health Authority* (1989) 47 BLR 34, CA; and *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA.

2 *Manson v Baillie* (1855) 2 Macq 80, HL; *Moffatt v Laurie* (1855) 15 CB 583 at 593; *Landless v Wilson* (1880) 8 R 289, Ct of Sess. See also *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA.

3 *Rumsey v North Eastern Rly Co* (1863) 32 LJCP 244.

4 *Bryant v Flight* (1839) 5 M & W 114; *Bird v McGahey* (1849) 2 Car & Kir 707.

5 *Taylor v Brewer* (1813) 1 M & S 290.

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273. Remuneration for speculative work.

Where studies or designs are submitted merely for approval or speculatively, no claim for remuneration arises unless the work is approved or used¹, and similarly in the case of plans or drawings submitted in competition, subject of course to the published terms of the competition².

Such 'probationary drawings'³ are in the nature of a tender, that is a mere proposal or offer to do work, and without acceptance there is no mutuality on which an implied contract to pay for them can be based.

If the plans or drawings submitted for approval are used for any purpose, they must be paid for⁴.

1 *Moffatt v Dickson* (1853) 13 CB 543; *Moffatt v Laurie* (1855) 15 CB 583; *Du Bosky & Partners v Shearwater Property Holdings plc* (1991) 54 BLR 71.

2 See *Ward v Lowndes* (1859) 1 E & E 940 at 941. On a true construction of the competition conditions it may become clear that work done in the hope of winning the competition is not work for which the winning entrant is entitled to payment in the event of his appointment as architect for a building project becoming ineffective due to cancellation of the project. If the design is not used, there is no reason why the winner should be in a better position than the losers merely by reason of an appointment being made which was ineffective: see *HN Jepson & Partners (a firm) v Severn Trent Water Authority* (1982) 20 BLR 53, CA.

3 See *Moffatt v Dickson* (1853) 13 CB 543.

4 *Landless v Wilson* (1880) 8 R 289, Ct of Sess. As to the copyright in plans see para 281 post.

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274. Procuring of tenders.

If the architect or engineer is authorised to obtain tenders, he is entitled, unless it is otherwise agreed, to payment of any expenses reasonably or necessarily incurred in connection therewith¹.

If the architect or engineer is instructed to prepare plans for a building or for works to cost approximately a certain sum and all the tenders sent in are considerably in excess of the sum mentioned, the employer may be entitled to repudiate the employment and refuse to pay him², on the ground that there was a condition that the works should be capable of being constructed for the sum, or approximately the sum, estimated³ and that the buildings as designed could not be carried out for that sum or anything near it⁴. The building owner may counterclaim damages for any cost overrun⁵ incurred subject to proof of negligence⁶.

1 See *Bayley v Wilkins* (1849) 7 CB 886.

2 *Burr v Ridout* (1893) Times, 22 February.

3 *Nye and Saunders & Partners v Bristow* (1987) 37 BLR 92, CA.

4 *Nelson v Spooner* (1861) 2 F & F 613 at 618. In that case Cockburn CJ left the following questions to the jury: (1) whether it was an express condition that the works should be capable of being executed for the estimated sum; if not, then (2) whether there was an implied condition that the work should be capable of being done for a sum reasonably near to the estimated sum; if so, then (3) whether the estimate was reasonably sufficient; and (4) as to a claim for work and labour on the plans, etc, whether the labour was bestowed or not under the special contract.

5 *Kidd v Mississauga Hydro-Electric Commission* (1979) 97 DLR (3d) 535, Ont HC; the claim in that case was negligent misrepresentation. As to counterclaims see generally CIVIL PROCEDURE vol 11 (2009) para 634 et seq.

6 But see *Copthorne Hotel (Newcastle) Ltd v Arup Associates* (1996) 58 ConLR 105 (negligence could not be established simply by contrasting the estimate with the strikingly different actual cost). As to negligence see generally NEGLIGENCE.

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B. TIME FOR PAYMENT

275. When the remuneration is payable.

The contract will generally make provision for payment by instalments¹. If the engagement of the architect or engineer is a construction contract², he will be entitled to payment by instalments save in very limited circumstances³.

If the contract is one to perform an entire work, such as to prepare plans, drawings and the specification for a fixed sum, or for a percentage of the whole cost of the work, then (unless there is express, implied or statutory provision for periodic payments) the right to payment does not arise until the whole work has been done⁴. Any instalment constitutes a debt due and payable, for which the architect can sue as and when it becomes due⁵.

1 This is almost invariably the case if standard forms are used, but the right to payment may only arise on entire completion of the relevant stage (see para 277 post). See eg *Workman, Clark & Co Ltd v Lloyd Brasileiro* [1908] 1 KB 968, CA; and the text and note 5 infra.

2 See the Housing Grants, Construction and Regeneration Act 1996 s 104(2); and paras 9, 155, 241 ante.

3 See *ibid* s 109; and para 148 ante.

4 See *Johnson v Gandy* (1855) 26 LTOS 72. As to entire contracts see para 8 ante. Where the contract is not an entire contract, the historical position has been that a person is entitled to payment from time to time in the absence of express or implied agreement otherwise: see *Appleby v Myers* (1867) LR 2 CP 651 at 660 per Blackburn J.

5 Cf *Workman, Clark & Co Ltd v Lloyd Brasileiro* [1908] 1 KB 968, CA. See also para 34 et seq ante; cf *Sidney Kaye, Eric Firmin & Partners (a firm) v Bronesky* (1973) 226 Estates Gazette 1395, (1973) 4 BLR 1, CA, per Lawton LJ; and para 277 post. See also the Housing Grants, Construction and Regeneration Act 1996 s 110 (dates for payment); and para 156 ante.

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C. AMOUNT OF PAYMENT

276. Amount payable.

Where an express agreement has been made as to the amount of the remuneration to be paid to an architect or engineer, he must be paid accordingly¹. Where, however, no agreement has been made, the architect or engineer is entitled to reasonable remuneration. The amount of such reasonable remuneration is a question of fact².

¹ *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248, 4 BLR 9, CA; *Lusty v Finsbury Securities Ltd* (1991) 58 BLR 66, CA.

² *Bryant v Flight* (1839) 5 M & W 114; *Bird v M'Gahey* (1849) 2 Car & Kir 707.

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277. Professional scale of charges.

In the case of architects the usual professional charge for designing and supervising the construction of buildings is based on a percentage of the total cost of the works. The Royal Institute of British Architects publishes a Client's Guide to Engaging an Architect including Guidance on Fees, which sets out percentage rates for various types of work¹. These rates are indicative only and they are not incorporated into the standard form of agreement for the appointment of an architect². Attempts have been made to induce the courts to accept charges of this kind as customary, but without success³. However, it is right to take into consideration the practice adopted by a large proportion of the profession⁴.

Such rates are, therefore, only binding on an employer who has either expressly or impliedly agreed to be bound by them⁵. In estimating what is a reasonable charge it is open to the court to adopt the current percentage scale on the cost as being a reasonable charge⁶. Furthermore, the rates and standard form of agreement may be implied where the client is familiar with them and with the practice of architects to use them⁷.

¹ The Association of Consulting Engineers issues scales analogous to those of the Royal Institute of British Architects.

² See the standard form of agreement for the appointment of an architect. As to standard forms of contract see para 2 ante.

³ *Gwyther v Gaze* (1875) 2 Hudson's BC (4th Edn) 34; and cf *Farthing v Tomkins* (1893) 9 TLR 566; *Elkington v Wandsworth Corp'n* (1924) 41 TLR 76 at 77-78; *Wilkie v Scottish Aviation Ltd* 1956 SC 198.

⁴ *Whipham v Everitt* (1900) Roscoe's BC (4th Edn) 171 at 172 per Kennedy J.

⁵ *Gilbert & Partners (a firm) v Knight* [1968] 2 All ER 248, 4 BLR 9, CA.

⁶ In *Brewin v Chamberlain* (13 May 1949, unreported), KBD, Birkett J awarded the architect a sum based on a quantum meruit, assessed by taking into account the amount of time spent on the work, the experience of the architect and the nature and magnitude of the building work. See also Rimmer's Law Relating to the Architect (2nd Edn, 1964), Appendix 7.

⁷ *Sidney Kaye, Eric Firmin & Partners (a firm) v Bronesky* (1973) 226 Estates Gazette 1395, (1973) 4 BLR 1, CA, per Lawton LJ. See also *Stovin-Bradford v Volpoint Properties Ltd* [1971] Ch 1007, [1971] 3 All ER 570, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(vi) Remuneration of Architect or Engineer/C. AMOUNT OF PAYMENT/278. Scale of payment for other work.

278. Scale of payment for other work.

Architects, engineers, and surveyors are often employed to perform work other than that of designing and supervising the construction of buildings and works, such as measuring, valuing, surveying, qualifying as witnesses and attending in court and before arbitrators, settling the accounts of builders and tradesmen. For work of this nature they are entitled, in the absence of any express agreement, to reasonable remuneration¹. A scale for the valuation of land and property, called 'Ryde's scale', is in use among land surveyors, but there is no custom making it binding upon their employers².

Generally the courts have not regarded with favour the mode of fixing the remuneration by way of a percentage³. Where, however, the employer is himself a surveyor, and can be shown to have recognised Ryde's scale in other transactions, then, in the absence of any facts from which other terms of employment may be inferred, it may be assumed that the employment was on the terms of Ryde's scale⁴.

1 *Debenham v King's College, Cambridge* (1884) 1 TLR 170. As to payment under express and implied contracts see para 272 ante.

2 *Debenham v King's College, Cambridge* (1884) 1 TLR 170; *Brocklebank v Lancashire and Yorkshire Rly Co* (1887) 3 TLR 575, CA; *Drew v Josolyne* (1888) 4 TLR 717, DC; *Faraday v Tamworth Union* (1916) 86 LJCh 436. For a refusal by the Court of Appeal to apply Ryde's scale in relation to a claim by a surveyor see *Francis v Harris* [1989] 1 EGLR 45, CA.

3 *Upsdell v Stewart* (1793) Peake 193 at 256 per Lord Kenyon; *Chapman v De Tastet* (1817) 2 Stark 294 per Lord Ellenborough CJ. See also *Perry v Barnett* (1885) 15 QBD 388 at 393, CA, per Brett MR; *Faraday v Tamworth Union* (1916) 86 LJCh 436 at 438 per Younger J ('I will not be the first to sanction judicially a basis of remuneration which at its best may create an unconscious bias in the mind of the witness remunerated').

4 *Buckland and Garrard v Pawson & Co* (1890) 6 TLR 421; *Adams Holden & Pearson v Trent Regional Health Authority* (1989) 47 BLR 34, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(vi) Remuneration of Architect or Engineer/D. DEATH AND BANKRUPTCY/279. Death of architect or engineer.

D. DEATH AND BANKRUPTCY

279. Death of architect or engineer.

The contract to employ an architect or engineer, being a personal one, is dissolved by the death or incapacity of the person employed¹, and is rendered void for the future, but it is not thereby rescinded ab initio.

Where the architect or engineer is entitled to payment by instalments at particular times², and dies during the progress of the work, his personal representative will be entitled to recover any instalments due at the time of his death³. Unless the contract is an entire contract with no express, implied or statutory provision for periodic payments⁴ it would seem that the personal representative of the deceased architect or engineer can recover the value of the work done by him and by which the employer has benefited⁵.

Any payments made by the employer on account during the progress of the work would not seem to be recoverable by him in case of the disablement of the architect by act of God, as the consideration would not have completely failed⁶.

1 See para 243 ante; and generally CONTRACT.

2 See para 275 ante.

3 *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311.

4 See para 275 ante.

5 This was admitted on the part of the defendant company in *Stubbs v Holywell Rly Co* (1867) LR 2 Exch 311.

6 See *Cuckson v Stones* (1858) 1 E & E 248. As to failure of consideration see CONTRACT vol 9(1) (Reissue) para 992. As to consideration generally see CONTRACT vol 9(1) (Reissue) para 727 et seq.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(vi) Remuneration of Architect or Engineer/D. DEATH AND BANKRUPTCY/280. Insolvency of the architect or engineer.

280. Insolvency of the architect or engineer.

On the architect's or engineer's becoming insolvent¹ all money owing to him becomes the property of his trustee in bankruptcy, to whom pass also the bankrupt's rights of action for breach of contract and wrongful dismissal². If, however, the trustee does not intervene, the bankrupt can himself sue for work done after the bankruptcy³.

If the architect or engineer is employed on the terms of being paid a salary, his remuneration does not vest in the trustee in bankruptcy, unless an order is made by the court⁴, appropriating part of the bankrupt's salary or income for the benefit of his creditors⁵.

1 This paragraph refers only to personal insolvency, which is regulated by the Insolvency Act 1986 Pts IX-XI (ss 264-385) (as amended; prospectively further amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY. Where the architect or engineer is a body corporate then the rules relating to corporate insolvency apply: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 1 et seq.

2 *Jameson & Co v Brick and Stone Co Ltd* (1878) 4 QBD 208; *Emden v Carte* (1881) 17 ChD 768, CA; *Bailey v Thurston & Co Ltd* [1903] 1 KB 137, CA; *Re Clayton, Collins v Clayton and Reade* [1940] Ch 539, [1940] 2 All ER 233. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) paras 418, 434 et seq.

3 *Jameson & Co v Brick and Stone Co Ltd* (1878) 4 QBD 208.

4 See the Insolvency Act 1986 s 310 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 449. See also *Re Tennant's Application* [1956] 2 All ER 753, [1956] 1 WLR 874, CA; following *Re Landau, ex p Trustee* [1934] Ch 549, CA.

5 *Re Brindle, ex p Brindle* (1887) 4 Morr 104; *Re Shine, ex p Shine* [1892] 1 QB 522, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(vii) Plans/281. Property in plans.

(vii) Plans

281. Property in plans.

Plans and drawings prepared by architects and engineers on behalf of a client are, in the absence of special agreement, the property of the person who pays for them¹. However, documents prepared in order to assist the architect or engineer to carry out his duties remain his property as they are not brought into existence on behalf of the client². In the absence of any special agreement, the architect or engineer owns the copyright in the plans and in the design embodied in the owner's building³. Thus if an extension to an existing building is commissioned from another architect in the same style as the original there will be a breach of the copyright of the design of that building owned by the original architect⁴. When an architect or engineer prepares plans for a reasonable fee, there is an implied licence that he will allow them to be used for all purposes connected with the erection of buildings on the site to which they relate⁵. There is no such licence when he has only received nominal remuneration⁶. Where there is a breach of the architect's copyright in his plans and an injunction is inappropriate, damages are at large and are to be assessed by considering what remuneration would be due to the architect if the building owner had applied for his licence to use the plans⁷.

Where two or more architects or engineers are practising as a partnership, the property of any documents is in the partnership and one partner cannot secretly copy any of those documents for his own purposes, because he would be in breach of the duty of good faith owed by one partner to another⁸.

¹ *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205, [1941] 2 All ER 483, CA; *Beresford v Driver* (1851) 14 Beav 387; *Ebdy v M'Gowan* (1870) 2 Hudson's BC (4th Edn) 9; *Gibbon v Pease* [1905] 1 KB 810, CA.

² *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205 at 206, [1941] 2 All ER 483 at 487, CA, per MacKinnon LJ.

³ *Blair v Osborne and Tomkins* [1971] 2 QB 78, [1971] 1 All ER 468, CA; *Stovin-Bradford v Volpoint Properties Ltd* [1971] Ch 1007, [1971] 3 All ER 570, CA; Copyright Act 1956 ss 4(2), 48(1) (repealed by the Copyright, Designs and Patents Act 1988 s 303(2), Sch 8, but continuing to have effect by virtue of the transitional provisions and savings contained in Sch 1). See also the Copyright, Designs and Patents Act 1988 ss 1, 2, 4, 11 (as amended); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) paras 57-58, 75-79, 118.

⁴ *Meikle v Maufe* [1941] 3 All ER 144.

⁵ *Blair v Osborne and Tomkins* [1971] 2 QB 78, [1971] 1 All ER 468, CA. See also *Hunter v Fitzroy Robinson & Partners* (1978) 10 BLR 84 (no injunction as damages adequate remedy).

⁶ *Stovin-Bradford v Volpoint Properties Ltd* [1971] Ch 1007, [1971] 3 All ER 570, CA.

⁷ *Chabot v Davies* [1936] 3 All ER 221; *Meikle v Maufe* [1941] 3 All ER 144; *Blair v Osborne and Tomkins* [1971] 2 QB 78, [1971] 1 All ER 468, CA; *Stovin-Bradford v Volpoint Properties Ltd* [1971] Ch 1007, [1971] 3 All ER 570, CA. See also the Copyright, Designs and Patents Act 1988 ss 96, 97 (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) paras 407, 410, 419); and *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818.

⁸ *Floydd v Cheney* [1970] Ch 602, [1970] 1 All ER 446; and see para 224 ante. As to the duty of good faith owed by one partner to another see PARTNERSHIP vol 79 (2008) PARA 106.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/5. ARCHITECTS AND ENGINEERS/(2) EMPLOYMENT OF ARCHITECTS AND ENGINEERS/(vii) Plans/282. Lien on plans, etc.

282. Lien on plans, etc.

The architect has a lien on the plans and drawings prepared by him, and need not deliver them up until he is paid¹, and may bring a claim for his fees although he still retains the plans. Even if he demands more than a reasonable fee for the plans, and that is refused, he is not precluded from bringing a claim for his charges and recovering reasonable remuneration². The employer may seek to recover such plans and drawings in proceedings and the court has power to order that he pay the amount claimed into court pending the outcome of the proceedings and that, if he does so, the plans and drawings should be given up to him³.

1 *Hughes v Lenny* (1839) 5 M & W 183. As to liens see generally LIEN. After an architect has been paid, there is an implied licence that his plans may be used for the purposes for which they were prepared: *Blair v Osborne and Tomkins* [1971] 2 QB 78, [1971] 1 All ER 468, CA.

2 *Hughes v Lenny* (1839) 5 M & W 183.

3 See CPR 25.1(1)(m); and CIVIL PROCEDURE vol 11 (2009) PARA 315. See also *Segbedzi v Glah* [1989] NLJR 1303, CA.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/6. VALUERS AND SURVEYORS/(1) INTRODUCTION/283. Meanings of 'valuer', 'appraiser' and 'surveyor'.

6. VALUERS AND SURVEYORS

(1) INTRODUCTION

283. Meanings of 'valuer', 'appraiser' and 'surveyor'.

The terms 'valuer' and 'appraiser' have similar meanings¹. An appraiser is a person appointed and sworn to estimate the value of property², while a valuer is a person who estimates or assesses values; that is, in the present context, a person who estimates or assesses the worth or value of, or who fixes a price for, property³. However, while definitions of 'valuer' and 'valuation' commonly place the main emphasis on value or worth in a material sense⁴, an 'appraiser' may also be a person who estimates the amount, quality or excellence of property⁵.

The term 'surveyor' usually describes a person whose business it is to inspect and examine land, houses or other property and to calculate and report upon its actual or prospective value or productiveness for certain purposes⁶, although surveyors also perform other functions⁷. An idea of the range of functions carried out by surveyors may be gained from the seven divisions or specialisations of the Royal Institution of Chartered Surveyors⁸. These are: (1) general practice (which includes valuation of land and buildings); (2) quantity surveying; (3) building surveying; (4) land agency and agriculture; (5) planning and development; (6) land and hydrographic surveying; and (7) minerals surveying⁹.

This part of the title covers the law relating to valuers and surveyors generally, including their statutory functions¹⁰, their legal relationships with clients¹¹ and third parties¹² and the extent of their liability¹³. It also deals specifically with the employment of quantity surveyors¹⁴. Quantity surveyors are employed by the architect¹⁵ or his agent in most sizeable building contracts and engineering works. They prepare cost estimates and plans, audit projects, manage construction costs and administer building contracts.

1 The term 'appraiser' was the more commonly used in statutes passed before the beginning of the twentieth century: see the Distress for Rent Act 1689 s 1 (as amended); the Appraisers Licences Act 1806 (repealed); and the Law of Distress Amendment Act 1888 s 5. See further DISTRESS vol 13 (2007 Reissue) paras 1011, 1052.

2 Compact Oxford English Dictionary (2nd Edn, 1991) p 65. An appraiser is not necessarily required to be sworn before he acts, notwithstanding that statute may require him to be sworn in particular cases: see eg the Distress for Rent Act 1689 s 1 (amended by the Parish Constables Act 1872 s 13); and DISTRESS vol 13 (2007 Reissue) para 1019.

3 Compact Oxford English Dictionary (2nd Edn, 1991) p 2212.

4 'The term 'valuer' (with a capital 'V' at any rate) is used nowadays to denote a member of a recognised profession comprised of persons possessed of skill and experience in assessing the market price of property, particularly real property': *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 477, [1982] 3 All ER 1 at 5, HL, per Lord Diplock. The Compact Oxford English Dictionary (2nd Edn, 1991) p 2212 defines 'valuation', *inter alia*, as an 'estimated value: worth or price as determined by deliberate determination' and as 'value or worth, especially of a material nature'. As to valuations for statutory purposes see paras 288-292 post; and as to contractual valuations see paras 293-295 post.

5 See the text and note 2 *supra*. As to appraisement as opposed to valuation see *Pappa v Rose* (1872) LR 7 CP 525, ExCh (broker required to decide whether raisins delivered were of 'fair average quality' as specified in contract of sale). As to the appraisement of arrested ships see SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 177-178.

6 Compact Oxford English Dictionary (2nd Edn, 1991) p 1974. 'Survey' is defined as meaning, inter alia, 'to examine the condition of a property on behalf of its prospective buyer': p 1974.

7 See the Compact Oxford English Dictionary (2nd Edn, 1991) p 1974. 'Surveyor' primarily means 'one who has the oversight or superintendence of a person or thing; an overseer, supervisor' but can also mean, inter alia, 'one who designs, and superintends the construction of, a building; a practical architect' or 'one whose business it is to survey land etc; one who makes surveys, or practices surveying': p 1974.

8 See para 284 post.

9 As to the appointment and functions of surveyors of ships see SHIPPING AND MARITIME LAW VOL 93 (2008) PARA 46 et seq.

10 See para 288 et seq post.

11 See paras 296-298 post.

12 See paras 299-300 post.

13 See paras 301-310 post.

14 See paras 311-313 post.

15 As to architects see para 220 et seq ante.

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284. Professional bodies.

There is no general statutory regulation of, or restriction upon qualification and practice as, a valuer or surveyor¹, but most valuers and surveyors are members of one or more of a number of professional organisations, in particular the Royal Institution of Chartered Surveyors². Members of the Central Association of Agricultural Valuers³ and of the Institute of Revenues, Rating and Valuation are frequently concerned with valuations of land for specific purposes⁴.

1 Certain inspections or valuations must be carried out by members of the Royal Institution of Chartered Surveyors (see note 2 *infra*) or persons satisfying other prescribed requirements: see eg the Charities Act 1993 s 36 (see CHARITIES vol 8 (2010) PARA 395). Certain instruments relating to farm business tenancies may be prepared by a member of either of those bodies or of the Central Association of Agricultural Valuers: see the Solicitors Act 1974 s 22 (amended by, *inter alia*, the Agricultural Tenancies Act 1995 s 35); and LEGAL PROFESSIONS vol 65 (2008) PARA 595.

2 The Royal Institution of Chartered Surveyors (RICS), which was founded in 1868 and incorporated by Royal Charter in 1881, adopted its present title in 1947. It was established to advance the profession of surveyor and the interests of its members. The RICS merged with the Incorporated Society of Valuers and Auctioneers in 2000. The address of the institution is 12 Great George Street, London, SW1P 3AD. The RICS publishes the *RICS Appraisal and Valuation Manual* (1st Edn, 1995) (known as 'the Red Book'). The manual lays down mandatory standards of professional practice for RICS members. All chartered surveyors are expected to comply with regulations governing their conduct as set out in the *New Conduct and Disciplinary Regulations* (July 2001). See also *Royal Institution of Chartered Surveyors v Shepherd* (1947) 149 Estates Gazette 370.

3 See note 1 *supra*.

4 The Institute of Revenues, Rating and Valuation (IRRV), like the RICS requires its members to comply with the *RICS Appraisal and Valuation Manual* (1st Edn, 1995): see p 2.

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285. Right to practise in the European Community.

Professions connected with valuing and surveying are subject to European Community principles and directives relating to freedom of establishment and free movement of workers. Nationals of member states who wish to practise a profession in the United Kingdom, and possess qualifications which would entitle them to carry on that activity in some other member state, cannot be prevented from doing so by the competent United Kingdom authority¹ on the grounds of inadequate qualifications². The competent United Kingdom authority may, however, require, from such an applicant, evidence of professional experience, and completion of an adaptation period or of an aptitude test³. The competent authority must accept as proof of good character, solvency, physical or mental health, the certificates issued by the competent authority in the member state of which the applicant is a national⁴.

1 For these purposes, 'competent authority' means, in relation to any document, certificate, diploma or qualification, or period of professional experience, referred to in the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824 (as amended), the authority, body or person in a member state authorised under the laws, regulations or administrative provisions of that state, to issue, award or recognise such document, certificate, diploma or qualification, or to certify any such period: reg 2(1).

2 See the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824 (amended by SI 2000/1960), which implement EC Council Directive 89/48 (OJ L19, 24.1.89, p 16) on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. The Royal Institution of Chartered Surveyors is among those professional associations and organisations explicitly included in a non-exhaustive list in the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824, reg 2, Sch 1 (amended by SI 2000/1960) of professional bodies subject to the regulations. Absence from the list does not imply that a profession or activity is exempt from the regulations. The European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824 (as amended), do not apply to professions which are the subject of a separate recognition directive.

3 See the European Communities (Recognition of Professional Qualifications) Regulations 1991, SI 1991/824, reg 6. The grounds on which these extra requirements may be imposed are set out in detail in reg 6. As to the requirements in relation to aptitude tests and adaptation periods see regs 7, 8.

4 See *ibid* reg 9. Where no such certificates are issued by the member state of origin, a declaration on oath must be accepted: see reg 9.

UPDATE

285 Right to practise in the European Community

TEXT AND NOTES--SI 1991/824 replaced: European Communities (Recognition of Professional Qualifications) Regulations 2007, SI 2007/2781 (amended by SI 2008/2683, SI 2009/1587, SI 2009/1885).

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/6. VALUERS AND SURVEYORS/(1) INTRODUCTION/286. Unfair competition.

286. Unfair competition.

Surveyors¹ are excluded² from the scope of Chapter I of Part I of the Competition Act 1998³, which prohibits agreements between undertakings which may affect trade within the United Kingdom and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom⁴. However, partnerships and companies of surveyors may be undertakings for the purposes of European Community competition law, which prohibits agreements between undertakings which may affect trade between member states, and have as their object or effect the prevention, restriction or distortion of competition within the common market⁵.

1 I.e. surveyors of land, quantity surveyors, surveyors of buildings or other structures and surveyors of ships.

2 See the Competition Act 1998 s 3(1)(d), Sch 4; and COMPETITION vol 18 (2009) PARA 119.

3 I.e. *ibid* Pt I Ch I (ss 1-16): see COMPETITION vol 18 (2009) PARA 116 et seq.

4 See *ibid* s 2(1), (4); and COMPETITION vol 18 (2009) PARA 116.

5 See the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 81 (as renumbered: see para 16 note 4 ante); and COMPETITION vol 18 (2009) PARA 61 et seq.

Halsbury's Laws of England/BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS (VOLUME 4(3) (REISSUE))/6. VALUERS AND SURVEYORS/(1) INTRODUCTION/287. The Valuation Office.

287. The Valuation Office.

The Valuation Office is an Executive Agency of the Inland Revenue, and was created in 1991 through the merger of the valuation office organisations for England and Wales and for Scotland¹. The office exists to provide a range of estate surveying and valuation services to government departments and to other clients in the public sector.

Most of the work of the office consists in helping local authorities to administer the rating and council tax systems², and it undertakes valuations of land and buildings on behalf of the Inland Revenue³. The office also assesses and recovers contributions in lieu of rates⁴, and provides valuation assistance to government departments and other public bodies which need it in order to exercise their statutory functions⁵.

An officer of the Valuation Office has power to enter upon land in order to survey it or estimate its value in connection with claims for the compulsory acquisition of that land or any other land or with claims for compensation arising under various statutes⁶.

1 These organisations had been established in 1910 as part of the Inland Revenue to undertake valuation work in connection with land value duties which were imposed by the Finance Act 1910 and have since been abolished.

2 Ie by compiling and keeping up to date lists of assessments on which liability to council tax or non-domestic rates is based: see para 289 post.

3 Such valuations are carried out mainly, though not exclusively, for the purposes of capital gains tax and inheritance tax: see generally CAPITAL GAINS TAXATION; INHERITANCE TAXATION.

4 Such contributions are made by government departments (which are exempt from rating) in respect of properties which they occupy, and are intended to correspond with the amount of rates which would be payable if there were no exemption. The task of assessing and collecting appropriate contributions is carried out by the Crown Property Unit of the Valuation Office.

5 Some of the work within this category is specifically allocated by statute to the Valuation Office: eg valuations of a dwelling house for the purpose of the tenant's 'right to buy' (see the Housing Act 1985 Pt V (ss 118-188) (as amended) see LANDLORD AND TENANT vol 27(3) (2006 Reissue) para 1795 et seq. See also HOUSING vol 22 (2006 Reissue) para 115. In respect of work which is not so allocated (including valuations in respect of acquisition and compensation claims arising under road schemes, asset valuations for various public bodies, and valuations in connection with housing benefit claims), the Valuation Office tenders in competition with other organisations.

6 See generally TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) paras 57-59.

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(2) STATUTORY AND CONTRACTUAL VALUATIONS

(i) Valuation for Statutory Purposes

288. Compulsory acquisition.

If a person served with a notice to treat¹ by an authority possessing powers of compulsory acquisition² does not agree with the authority as to the amount of compensation to be paid for his interest in the land or for any damage sustained by him by reason of the execution of the works, the question of the disputed compensation must be referred to the Lands Tribunal³. If a person claims compensation in respect of any land which has been taken for, or injuriously affected by, the execution of works, any dispute as to the compensation must likewise be referred to the Lands Tribunal⁴.

If a person whose land is to be compulsorily acquired is prevented from treating by absence from the United Kingdom⁵, or if he cannot be found after diligent inquiry has been made, the amount of compensation must normally be determined by an able practical surveyor selected from the members of the Lands Tribunal and must be paid into court⁶. If land is to be compulsorily acquired from a person under any disability or incapacity, compensation must not be less than an amount determined by the valuation of two able practical surveyors, one appointed by each party, except where compensation has been determined under compulsory powers⁷.

Where an authority acquiring land under compulsory powers wishes to enter and use the land before the purchase price or compensation has been fixed, it may do so by paying into court the value of the land as determined by an able practical surveyor⁸. Such a surveyor must examine the premises properly to form a fair judgment of their value⁹ but, if he does so in good faith and in pursuance of his duty, the fact that the sum is inadequate or that he valued without sufficient knowledge of the relevant facts does not entitle the owner to an injunction restraining the purchaser from taking possession of the land pending a proper valuation¹⁰.

1 As to the notice to treat see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 616 et seq.

2 As to such authorities see generally COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 519-521.

3 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 718. As to the Lands Tribunal generally, and as to the assessment of compensation see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 720 et seq, 753 et seq.

4 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 718 (reference of dispute), PARA 877 et seq (assessment of compensation).

5 For the meaning of 'United Kingdom' see para 25 note 10 ante.

6 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 718.

7 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 639.

8 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 639 et seq.

9 *Cotter v Metropolitan Rly Co* as reported in (1864) 10 LT 777, where it was held that it was insufficient for the valuer to conclude that all houses in a street were of the same value because their exteriors were identical.

10 *River Roden Co Ltd v Barking Town UDC* (1902) 18 TLR 542; affd 18 TLR 608, CA. Cf *Cotter v Metropolitan Rly Co* as reported in (1864) 10 LT 777, where an injunction was granted because the surveyor had never entered the buildings which he purported to have valued.

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289. Rating and council tax.

Valuation officers appointed by the Inland Revenue¹ are responsible for compiling and maintaining valuation lists of non-domestic property for the purposes of rating² and for dealing with proposals for alterations to such lists³. Listing officers appointed by the Inland Revenue⁴ have similar responsibilities in relation to the valuation of dwellings for the purposes of council tax⁵.

1 The Commissioners of Inland Revenue must appoint a valuation officer for each billing authority and the central valuation officer: Local Government Finance Act 1988 s 61(1) (amended by the Local Government Finance Act 1992 ss 117(1), 118(1), Sch 13 para 69). The remuneration of, and any expenses incurred by, valuation officers in carrying out their functions in relation to non-domestic rating (including the remuneration and expenses of persons, whether or not in the service of the Crown, employed to assist them) must be paid out of money provided by Parliament: Local Government Finance Act 1988 s 61(2). See RATING AND COUNCIL TAX vol 39(1B) (Reissue) para 6.

2 See *ibid* s 41 (amended by the Local Government and Housing Act 1989 s 139, Sch 5 paras 1, 19, 79(3); and by the Local Government Finance Act 1992 ss 117(1), 118(1), Sch 13 para 59); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) para 121.

3 See the Local Government Finance Act 1988 s 55(2); the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993, SI 1993/291 (amended by SI 1994/1809; SI 1995/363; SI 1995/609; SI 1995/623; SI 1997/2971; SI 2000/409; SI 2000/598; SI 2000/792; SI 2001/1203; SI 2001/1271; SI 2001/1439; and SI 2002/498); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) para 128.

4 The Commissioners of Inland Revenue must appoint a listing officer for each billing authority: Local Government Finance Act 1992 s 20(1). The remuneration of, and any expenses incurred by, listing officers in carrying out their functions in relation to council tax (including the remuneration and expenses of persons, whether or not in the service of the Crown, to assist them) must be paid out of money provided by Parliament: see s 20(2), (3). See further RATING AND COUNCIL TAX vol 39(1B) (Reissue) para 230.

5 See *ibid* Pt I Ch II (ss 20-29) (as amended); the Council Tax (Alteration of Lists and Appeals) Regulations 1993, SI 1993/290 (as amended); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) para 268 *et seq*.

UPDATE

289 Rating and council tax

NOTE 3--SI 1993/291 now replaced: Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009, SI 2009/2268; Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, SI 2009/2269 (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 128-142); Non-Domestic Rating (Alteration of Lists and Appeals) (Wales) Regulations 2005, SI 2005/758 (amended by SI 2006/1035).

NOTE 5--SI 1993/290 replaced in relation to England: Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009, SI 2009/2269 (see NOTE 3); Council Tax (Alteration of Lists and Appeals) (England) Regulations 2009, SI 2009/2270 (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 273, 274).

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290. Companies and other corporate bodies.

A public company must not allot shares as fully or partly paid up for a consideration other than cash unless the consideration has been independently valued and a report as to its value made to the company within the preceding six months¹. Before a building society advances money on the security of land, a written report on the value of the land and any factors likely materially to affect its value must be obtained from a person who is competent to value and who is not disqualified from making such a report². Periodic actuarial valuations are required as a means of investigating the financial condition of industrial assurance companies³ and registered societies which are not friendly societies⁴.

1 See the Companies Act 1985 s 103(1); and COMPANIES vol 15 (2009) PARA 1120 et seq.

2 See the Building Societies Act 1986 ss 6A, 6B (both as added); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2006-2007.

3 See INDUSTRIAL ASSURANCE vol 24 (Reissue) para 293 et seq.

4 See the Friendly Societies Act 1974 s 41 (repealed in relation to friendly societies by the Friendly Societies Act 1992 s 95); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2203-2204.

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291. Distress and execution.

If, following a distress for rent, an appraisalment of the chattels distrained is necessary before sale¹, the appraisers must be reasonably competent, although not necessarily professional appraisers², and they must be disinterested persons³. Two appraisers are necessary unless the tenant consents to one acting⁴. An appraisalment may also be required following a distress for certain taxes⁵ and other duties⁶.

For the purpose of selling or valuing goods seized in execution under court process, the district judge in the county court may appoint such brokers and appraisers as appear to him to be necessary⁷. The judge in the county court may appoint in writing any court bailiff to act as a broker or appraiser for these purposes⁸.

1 As to when an appraisalment is necessary see DISTRESS vol 13 (2007 Reissue) para 1019.

2 *Roden v Eyton* (1848) 6 CB 427.

3 See *Lyon v Weldon* (1824) 2 Bing 334 (landlord should not be appointed); *Westwood v Cowne* (1816) 1 Stark 172; *Rocke v Hills* (1887) 3 TLR 298 (bailiff should not be appointed); and DISTRESS vol 13 (2007 Reissue) para 1019.

4 See *Allen v Flicker* (1839) 10 Ad & El 640; and DISTRESS vol 13 (2007 Reissue) para 1019.

5 See eg the Taxes Management Act 1970 s 61(5) (amended by the Finance Act 1989 ss 152(1), (5), 187(1), Sch 17 Pt VIII); DISTRESS vol 13 (2007 Reissue) para 1127 et seq; INCOME TAXATION vol 23(2) (Reissue) para 1815.

6 See eg the Merchant Shipping Act 1995 s 208 (distress for general light dues); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1086.

7 See the County Courts Act 1984 s 95(1) (amended by virtue of the Courts and Legal Services Act 1990 s 74); and COURTS vol 10 (Reissue) para 733.

8 See the County Courts Act 1984 s 96(1); and COURTS vol 10 (Reissue) para 733. A bailiff so appointed may, without other licence in that behalf, perform all the duties which brokers or appraisers appointed under s 95 (as amended) may perform: s 96(2).

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292. Executors and trustees.

If a personal representative proposes to exercise his statutory power of appropriation, he must fix the value of the respective parts of the assets and liabilities of the deceased, and for that purpose must employ a duly qualified valuer when necessary¹. An appropriation of a mortgage at par without such an ascertainment of the value of the mortgage as a security may be a breach of trust if the mortgaged property is in fact in bad condition².

Trustees may employ duly qualified agents to ascertain the value of trust property, and any valuation so made in good faith is binding on all persons interested under the trust³.

1 See the Administration of Estates Act 1925 s 41(3); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 577.

2 See *Re Brookes, Brookes v Taylor* [1914] 1 Ch 558, where the mortgaged premises were derelict and practically worthless and the trustee had appropriated the mortgage at par without either inspecting the mortgaged premises or making any inquiry as to their actual value as a security.

3 See the Trustee Act 1925 s 22(3) (as amended); and TRUSTS vol 48 (2007 Reissue) para 1054.

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(ii) Valuation for Contractual Purposes

293. Effect of contractual provision for valuation.

An agreement under which property is to be transferred at a 'fair price' or at a 'reasonable valuation' is not void for uncertainty, and the court may decree specific performance of such an agreement and order such inquiries as may be necessary to ascertain the fair price¹.

Where parties have agreed to transfer property at a price to be fixed by a valuer or valuers appointed by the parties and the valuation machinery breaks down², a fundamental question of construction is whether the prescribed mode of ascertaining the price is an essential term of the contract or whether the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential³. If the valuation machinery which has broken down is held to be subsidiary and not an essential term of the contract (or testamentary option)⁴, the court may intervene and substitute other machinery to ascertain the price in order that the agreement may be carried out⁵. Even where, on a true construction, the use of the valuation machinery which has broken down is to be regarded as an essential term of the agreement⁶, the court may intervene and provide substitute machinery if the agreement has already been partly performed⁷, or if the valuation provision relates to a subsidiary part of a wider contract which is itself valid and enforceable⁸.

1 *Gaskarth v Lord Lowther* (1805) 12 Ves 107; *Milnes v Gery* (1807) 14 Ves 400 at 407 per Grant MR; *Morgan v Milman* (1853) 3 De GM & G 24 at 34 per Lord Cranworth LC; *Talbot v Talbot* [1968] Ch 1, [1967] 2 All ER 920, CA; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) paras 851-853.

2 Such a breakdown may result from the act of one of the parties (eg where he refuses to appoint a valuer or denies an appointed valuer access to the property), from failure of the duly appointed valuers to agree on the price or on the identity of a required umpire, or from causes beyond the control of the parties or their valuers, such as the death of an umpire or his failure to complete the valuation by the prescribed date. But such distinctions, being tangential to the question of whether a prescription as to the mode of valuation is an essential term, are rarely to be relied on: see *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 484, [1982] 3 All ER 1 at 10, HL, per Lord Fraser of Tullybelton.

3 Under modern conditions, contractual terms providing for a particular method of assessing price will normally be regarded as subsidiary to the main purpose of the agreement, which is for sale and purchase of the property at a fair or reasonable value: *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 484, [1982] 3 All ER 1 at 10, HL, per Lord Fraser of Tullybelton.

4 'A testamentary option is something which potentially can become a contract on its exercise at any time by the person holding the option ... because the person getting a property under a testamentary option gets it by exercising that option and entering into a contract in that behalf with the executors': *Talbot v Talbot* [1968] Ch 1 at 9-10, [1967] 2 All ER 920 at 921-922, CA, per Scarman LJ (testator provided for two of his children to have option of purchasing two farms at a 'reasonable valuation', but prescribed no valuation machinery and none was agreed by the beneficiaries).

5 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL (lease gave the lessee an option to purchase the freehold at a price to be agreed by valuers appointed by the parties and the landlord refused to appoint a valuer); *Re Malpass* [1985] Ch 42, [1984] 2 All ER 313 (an option was given by will to purchase a farm at a value to be determined by the district valuer, but the district valuer declined to value the property). The alternative remedy of a mandatory injunction compelling the vendor to appoint a valuer has been held to be unsuitable because the only sanction for non-compliance would be imprisonment for contempt of court: see *Sudbrook Trading Estate Ltd v Eggleton* supra. However, the court probably may, in an appropriate case, order a party to do what is necessary to make the contractual machinery work, eg by appointing a valuer

or seeking such an appointment from the designated professional body (*Royal Bank of Scotland plc v Jennings* [1995] 2 EGLR 87; disapproving *Harben Style Ltd v Rhodes Trust* [1995] 1 EGLR 118) or by allowing a duly appointed valuer to enter and carry out his valuation (*Morse v Merest* (1821) 6 Madd 26; *Smith v Peters* (1875) LR 20 Eq 511).

6 In most present-day cases a prescription as to the mode of valuation is unlikely to be construed as an essential term of the contract unless it seeks to harness special knowledge which is needed to determine the value of the property in question, such as an auditor's knowledge of a company whose shares are to be valued: see *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 484, [1982] 3 All ER 1 at 10, HL, per Lord Fraser of Tullybelton.

7 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 484, [1982] 3 All ER 1 at 11, HL, per Lord Fraser of Tullybelton; *Gregory v Mighell* (1811) 18 Ves 328; *Dinham v Bradford* (1869) 5 Ch App 519; *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA.

8 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 485, [1982] 3 All ER 1 at 11, HL, per Lord Fraser of Tullybelton; *Dinham v Bradford* (1869) 5 Ch App 519; *Richardson v Smith* (1870) 5 Ch App 648; *Smith v Peters* (1875) LR 20 Eq 511.

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294. Valuer as arbitrator or independent expert.

Where a valuer¹ is appointed to settle a dispute between two parties, or to decide a matter on which they have opposing interests², the valuer may or may not act as an arbitrator in reaching his decision³. Whether or not he is so acting affects his potential liability for negligence⁴ and also determines the extent to which his decision is binding upon the parties⁵. It is provided by statute that an arbitrator (unlike a ordinary valuer)⁶ is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator, unless the act or omission is shown to have been in bad faith⁷, and will thus not be liable for negligence⁸. The extent to which this statutory provision changes the existing law is doubtful, since many authorities have decided that an arbitrator already enjoys such immunity⁹. An arbitrator's decision is, however, subject to certain rights of appeal¹⁰. Neither a 'mutual valuer'¹¹ nor a 'quasi-arbitrator' is likely to enjoy an arbitrator's immunity¹², and if the primary process intended is one of valuation rather than arbitration, calling the valuer an 'umpire' will not give him immunity¹³.

The question whether a given valuer has been appointed as an arbitrator¹⁴ is determined not only by the way he is described in the agreement which appoints him¹⁵, but by the agreement construed as a whole¹⁶. Thus the parties' original intent may be inferred from the appointing clause interpreted in the light of other clauses in the document¹⁷. Where the agreement is ambiguous or allows for different options, subsequent events may indicate which option was taken up, and, therefore, whether in the event the valuer appointed was an arbitrator¹⁸.

A valuer who is not appointed as an arbitrator but who nevertheless claims immunity from liability for negligence must show that, in all the circumstances of the case, his functions are judicial in character¹⁹. That is not simply a matter of acting fairly as between the parties²⁰, or being required to determine a question as between opposed interests²¹, and has been said to depend on the existence of a formulated dispute between two parties²². Where the valuer's functions are not judicial in character, a valuer by whose decision two parties agree to be bound owes a duty of care to both parties and, if negligent in reaching his decision, will be liable to the party who is disadvantaged by his negligent valuation²³. There is no material difference in legal principle between a valuer who undertakes to provide a valuation of property and one who undertakes to determine the rent under a rent review clause²⁴.

1 For the meaning of 'valuer' see para 283 ante.

2 Eg the rental value of premises for the purpose of a rent review. See also *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA (surveyor appointed to determine the surrender value of a lease); *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL (auditors instructed to value shares in a private company pursuant to an agreement for their sale at the price so determined).

3 See *Sutcliffe v Thackrah* [1974] AC 727 at 745, [1974] 1 All ER 859 at 870, HL, per Lord Morris of Borth-y-Gest and at 735 and 862 per Lord Reid. 'The position of a valuer is very different from an arbitrator. If a valuer is negligent in making a valuation he may be sued by the party - vendor or purchaser - who is injured by his wrong valuation. But an arbitrator is different. In my opinion he cannot be sued by either party to the dispute': *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 408, CA, per Lord Denning MR. As to the meaning of 'arbitrator' see ARBITRATION vol 2 (2008) PARA 1219. It has been argued that such an arbitrator, being appointed by one or more of the parties to the eventual dispute, does not exercise 'judicial functions' analogous to those of a judge or statutory arbitrator, whose appointment is in no way governed by parties to individual disputes which eventually come before him: see *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 431-432, [1975] 3 All ER 901 at 918-919, HL, per Lord Kilbrandon (uncle gave shares to nephew (his employee); shares to be sold back to uncle if employment terminated at value determined by company's auditors;

employment terminated and valuation and sale took place; subsequent valuation when company 'went public' disclosed apparent negligence in original (low) valuation; nephew sued uncle; held that auditor was liable if he made valuation negligently unless he could show that a formulated dispute between at least two parties had been submitted to him to resolve in such a manner that he was called upon to exercise a judicial function and the parties had agreed to accept his decision).

4 See the text and notes 6-9 infra.

5 See para 295 post.

6 As to a valuer's negligence see paras 299, 303 et seq post.

7 See the Arbitration Act 1996 s 29(1). This immunity applies to an employee or agent of an arbitrator as it applies to the arbitrator himself: see s 29(2). The provisions of Pt I (ss 1-84) apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of Pt I only if in writing: s 5(1). See further ARBITRATION vol 2 (2008) PARAS 1213, 1237.

8 It has been doubted whether it is right to allow immunity to attach to arbitrators as a class when that class includes arbitrators whose role is primarily to use their professional expertise as a mutual valuer might do (see *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 442, [1975] 3 All ER 901 at 927, HL, per Lord Fraser of Tullybelton); and it has been questioned whether a valuer appointed as arbitrator under the Arbitration Acts who has a purely investigatory role, and who performs no function even remotely resembling the judicial function save that he finally decides a dispute or difference that has arisen between the parties, should enjoy a judicial immunity which so-called 'quasi-arbitrators' do not, albeit that the question has yet to be determined conclusively (see *Arenson v Casson Beckman Rutley & Co* supra at 440 and 925 per Lord Salmon).

9 See eg *Turner v Goulden* (1873) LR 9 CP 57, and this view was supported obiter by a majority of the House of Lords in *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL. See also *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 408, CA, per Lord Denning MR; but see note 8 supra. The Supply of Goods and Services Act 1982 s 13, which implies a duty of reasonable care and skill into a contract for the supply of a service, does not apply to services rendered by an arbitrator: see the Supply of Services (Exclusion of Implied Terms) Order 1985, SI 1985/1, art 2; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 35.

10 As to the remission or setting aside of an arbitrator's award see ARBITRATION vol 2 (2008) PARA 1276 et seq.

11 See *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 441, [1975] 3 All ER 901 at 927, HL, per Lord Fraser of Tullybelton.

12 'Quasi-arbitrator' and 'quasi-judicial functions' have been invoked but never defined. They cannot mean more than in much the same position as an arbitrator or judge': *Sutcliffe v Thackrah* [1974] AC 727 at 758, [1974] 1 All ER 859 at 882, HL, per Lord Salmon. 'There may be circumstances in which what is in effect an arbitration is not one that is within the provisions of the Arbitration Act. The expression quasi-arbitrator should only be used in that connection': *Sutcliffe v Thackrah* supra at 752-753 and 876-877 per Lord Morris of Borth-y-Gest. See also, as to several possible meanings of 'quasi-arbitrator', *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 422-423, [1975] 3 All ER 901 at 910-911, HL, per Lord Simon of Glaisdale. The expression appears subsequently to have acquired no settled meaning.

13 '... The mere word 'umpire' is quite neutral, and does not cast any real light on the matter in dispute': *Safeway Food Stores Ltd v Banderway Ltd* [1983] 2 EGLR 116 at 118 per Goulding J.

14 The parties may arrange for the agent of one party to become an arbitrator as between them should a certain event occur, but this must be a definite arrangement: see *Sutcliffe v Thackrah* [1974] AC 727 at 745, [1974] 1 All ER 859 at 870, HL, obiter, per Lord Morris of Borth-y-Gest.

15 'You cannot make a valuer an arbitrator by calling him so or vice versa': *Taylor v Yielding* (1912) 56 Sol Jo 253 per Neville J.

16 *Taylor v Yielding* (1912) 56 Sol Jo 253 (agreement that value of shares would be determined by two valuers appointed by the parties or by an umpire appointed by the valuers was an agreement to arbitrate as to value and not a mere agreement to have a valuation); and see *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL.

17 See *Langham House Developments Ltd v Brompton Securities Ltd* [1980] 2 EGLR 117 (clause in lease concerning rent drafted so as to suggest intended valuation by nominated surveyor compared with adjacent clause concerning insurance which 'reeks of arbitration'; different intent inferred from obvious contrast); *Safeway Food Stores Ltd v Banderway Ltd* [1983] 2 EGLR 116 (meanings of contrasting clauses illuminated by comparison).

18 *North Eastern Co-operative Society Ltd v Newcastle-upon-Tyne City Council* [1987] 1 EGLR 142 (contrasting clauses in lease; 'independent surveyor or arbitrator' prescribed and instructed was not, in the event, an arbitrator, owing to circumstances of his appointment).

19 See *Sutcliffe v Thackrah* [1974] AC 727 at 738, [1974] 1 All ER 859 at 865, HL, per Lord Reid.

20 See *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL, especially at 745 and 870 per Lord Morris of Borth-y-Gest; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL. See also *Palacath Ltd v Flanagan* [1985] 2 All ER 161, [1985] 1 EGLR 86 (surveyor determining rent under a rent review clause not acting as an arbitrator since he had been appointed as an expert and was entitled to rely on his own judgment and opinion and to reach a decision unfettered by the submissions of the parties).

21 *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL.

22 'The main difference between [a mutual valuer and an arbitrator] is that the latter, like the judge, has to decide a dispute that has already arisen, and he usually has rival contentions before him, while the mutual valuer is called in before a dispute has arisen, in order to avoid it': *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 441, [1975] 3 All ER 901 at 927, HL, per Lord Fraser of Tullybelton. 'In my view the essential prerequisite for [a valuer] to claim immunity is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve': *Arenson v Casson Beckman Rutley & Co* supra at 424 and 912 per Lord Simon of Glaisdale.

23 *Zubaida v Hargreaves* [1995] 1 EGLR 127 at 128, CA, per Hoffmann LJ (rent review; held on facts that RICS-appointed surveyor had not been negligent). See also *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 408, CA, per Lord Denning MR (rent review; agreed surveyor appointed to determine value of lease; report was 'non-speaking' report and had been prepared honestly and in good faith; held that landlord was bound by valuation). The existence of the independent expert's duty of care was also recognised in *Belvedere Motors Ltd v King* [1981] 2 EGLR 131; *Wallshire Ltd v Aarons* [1989] 1 EGLR 147; *Lewisham Investment Partnership Ltd v Morgan* [1997] 2 EGLR 150; *Currys Group plc v Martin* [1999] 3 EGLR 165, although in each case it was held on the facts that the valuer had not been negligent.

24 *Currys Group plc v Martin* [1999] 3 EGLR 165.

UPDATE

294 Valuer as arbitrator or independent expert

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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295. Judicial review of valuation.

Where a valuer¹ acts as an arbitrator in making a valuation², an appeal from his valuation lies to the court³ on a point of law⁴.

Where a valuer acts as an independent expert in making a valuation⁵, the extent to which his valuation is subject to review by the court depends upon the construction of the agreement under which he is appointed to act⁶. If, on its true construction, that agreement expressly or by implication confers upon the valuer the exclusive remit to determine a question, and provides for the parties to be bound by his determination, then the valuation is not open to review by the court if the valuer acted honestly and in good faith⁷.

If the parties have agreed that the expert's decision should be final and conclusive, it remains so even where it is a 'speaking' valuation whose reasoning contains errors of law⁸. A 'non-speaking' valuation clearly cannot err in its reasoning if it contains no reasoning at all, and the relevant question is not whether defective reasoning can be found in a report that happens to be unusually voluble, but whether it is possible to say from all the evidence which is properly before the court what the valuer has done and why he has done it⁹. A valuation made by an independent expert may, however, be set aside where the agreement so provides¹⁰, where the appointment of the expert is invalid¹¹, where there is fraud or collusion between the valuer and one of the parties¹², or where the expert has gone outside his remit by answering a different question from that which was remitted to him¹³ or has failed to comply with any conditions imposed by the agreement¹⁴.

1 For the meaning of 'valuer' see para 283 ante.

2 See para 294 ante.

3 Appeal to the High Court or a county court under the Arbitration Act 1996 ss 69, 105: see ARBITRATION vol 2 (2008) PARAS 1251, 1278.

4 See *ibid* s 69(7); and ARBITRATION vol 2 (2008) PARA 1278. As to judicial review see JUDICIAL REVIEW vol 61 (2010) PARA 601 et seq; CIVIL PROCEDURE vol 12 (2009) PARA 1530.

5 See para 294 ante.

6 The court has jurisdiction in advance of a valuation by an independent expert to determine a question as to the limits of the expert's remit or the conditions governing his valuation, but it will normally decline to do so where the question is merely hypothetical: *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyd's Rep 106 per Lightman J. See also *Norwich Union Life Insurance Society v P & O Property Holdings Ltd* [1993] 1 EGLR 164, CA; *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575, [1996] 1 WLR 48, HL (contract between BT and Mercury provided for issue between them to be determined by Director General of Telecommunications; held that his actions could lead to disputes falling outside the realm of public law, and whether his determination could be challenged depended, inter alia, on terms of his remit in the contract).

7 *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Baber v Kenwood Manufacturing Co* [1978] 1 Lloyd's Rep 175, CA; *Belchier v Reynolds* (1754) 3 Keny 87 at 91 per Strange MR.

8 *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA (disapproving *Burgess v Purchase & Sons (Farms) Ltd* [1983] Ch 216, [1983] 2 All ER 4). 'If [the expert] has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity': *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 at 108 per Knox J. See also *Pontsarn*

Investments Ltd v Kansallis-Osake-Pankki [1992] 1 EGLR 148; *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyd's Rep 106 (and see the discussion of the principles set out in this case in *National Grid Co plc v M25 Group Ltd* [1998] 2 EGLR 85 (on appeal [1999] 1 EGLR 65, CA, where the appeal was allowed but the discussion was held to be a useful summary)). Earlier cases, which suggested that valuation could be impugned on the ground of mistake, now appear supportable only on the ground that the agreements under consideration did not confer exclusive jurisdiction on the valuers: see *Collier v Mason* (1858) 25 Beav 200 at 204 per Romilly MR; *Johnston v Chestergate Hat Manufacturing Co Ltd* [1915] 2 Ch 338; *Dean v Prince* [1954] Ch 409, [1954] 1 All ER 749, CA.

9 *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 177, [1992] 1 WLR 277 at 284, CA, per Dillon LJ; applied in *Dixons Group plc v Jan Andrew Murray-Oboynski* (1997) 86 BLR 16 (where there is no evidence of the basis of determination to be applied by the valuer, it cannot be shown that he has failed to follow instructions). In the case of a non-speaking valuation, a court should not, other than in wholly exceptional circumstances, permit attempts to argue by inference that the reasoning of the valuer must have been wrong: *Morgan Sindall plc v Sawston Farms (Cambs) Ltd* [1999] 1 EGLR 90, CA.

10 *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyd's Rep 106.

11 Eg because it is made out of time: see *Darlington Borough Council v Waring & Gillow (Holdings) Ltd* [1988] 2 EGLR 159.

12 *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 407, CA, per Lord Denning MR.

13 Ie such as would occur if an independent expert appointed to value shares in a company valued the wrong number of shares or valued shares in the wrong company: *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 179, [1992] 1 WLR 277 at 287, CA, per Dillon LJ. See also *Macro v Thompson (No 2)* [1997] 1 BCLC 626, [1996] BCC 707, CA.

14 *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 at 108 per Knox J; *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992] 1 EGLR 148; *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyd's Rep 106 (and see the discussion of the principles set out in this case in *National Grid Co plc v M25 Group Ltd* [1998] 2 EGLR 85 (on appeal [1999] 1 EGLR 65, CA, where the appeal was allowed but the discussion was held to be a useful summary)).

UPDATE

295 Judicial review of valuation

NOTE 9--*Morgan*, cited, applied in *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch), [2008] 1 BCLC 404.

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(3) VALUER AND CLIENT

296. Basis of relationship.

The engagement or instruction of a valuer is normally a matter of contract between the valuer and the client¹. Where the client engages a firm of valuers, the contract is made with the firm and not with the individual who may carry out the valuation², and the firm is responsible to the client for the due performance of its contractual obligations by its employees and probably for the performance of a person other than an employee to whom it delegates the task of valuation³.

The relationship which is created between the valuer and the person who appoints him is not merely one of agent and principal, but of professional person and client⁴, and documents which a valuer brings into existence in order to carry out the service which he is engaged to perform are therefore the property of the valuer and not of the client⁵.

1 Such a contract is one for the supply of a service and is governed by the Supply of Goods and Services Act 1982 Pt II (ss 12-16): see SALE OF GOODS AND SUPPLY OF SERVICES. See also generally CONTRACT. The contract need not be made in any particular form, but chartered surveyors and incorporated valuers are required by their rules of professional conduct to provide written confirmation of instructions: *RICS Appraisal and Valuation Manual* (1st Edn, 1995) Practice Statement 2.

2 The individual valuer may nevertheless be liable to the client in tort for negligence: see *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 866, [1989] 2 All ER 514 at 537, HL, per Lord Griffiths; *Merrett v Babb* [2001] EWCA Civ 214, [2001] QB 1174. See generally paras 299-300 post.

3 *Luxmoore-May v Messenger May Baverstock (a firm)* [1990] 1 All ER 1067, [1990] 1 WLR 1009, CA (auctioneers).

4 *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205, [1941] 2 All ER 483, CA.

5 *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205, [1941] 2 All ER 483, CA; *London School Board v Northcroft* (1889) 2 Hudson's BC (4th Edn) 147.

UPDATE

296-298 Valuer and Client

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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297. Remuneration of valuer.

A valuer is entitled to charge the client for his professional services, in accordance with the contract under which he is engaged¹. It was formerly common practice for valuers to charge by reference to a scale of fees published by the Royal Institution of Chartered Surveyors², but that institution has now abolished scale fees.

Where an authority acquires land compulsorily, or by agreement when the parties know that it could be acquired compulsorily³, the surveyors' fees incurred by the former owner are calculated according to Ryde's Scale, which applies in its revised form as from 1 July 1996⁴. Expenditure such as the fees paid by the owner to a valuer or surveyor properly incurred in preparing the owner's claim for compensation and negotiating its settlement should be included in any compensation awarded against the acquiring authority⁵. Whether fees have been properly incurred for this purpose is a question of fact⁶.

If the valuer and client do not expressly agree about how much the valuer is to be paid, or as to how that amount is to be determined, a term will be implied into the contract between them that the client will pay a reasonable charge⁷. What is a reasonable charge is a question of fact⁸.

A valuer is not entitled to be paid for services which have been performed negligently, and are therefore useless to the client⁹. Payment made for such services may be reclaimed¹⁰.

1 Where services are rendered in connection with litigation, an agreement under which fees are payable on a contingency basis is unenforceable on grounds of public policy, although this does not apply to fees payable to a surveyor for securing a reduction in the rateable value of a client's property, not least because a local valuation court is not a court of law: *Pickering v Sogex Services (UK) Ltd* [1982] 1 EGLR 42. Nor does this stricture apply to fees for obtaining planning permission, as, even if such an arrangement is in breach of the rules of the profession, such a breach is not necessarily contrary to law: *Picton Jones & Co v Arcadia Developments Ltd* [1989] 1 EGLR 43. This remains the case even if such services may require the surveyor to appear before a valuation tribunal or a public planning inquiry. The Courts and Legal Services Act 1990 s 58 (as substituted), which allows a solicitor to enter into a conditional fee agreement in certain limited circumstances, has not changed public policy because of its narrow scope: see *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695 at 707 per Garland J. See further LEGAL PROFESSIONS vol 66 (2009) PARA 953.

2 As to the Royal Institution of Chartered Surveyors see para 284 ante.

3 As to valuations and surveys carried out in connection with the compulsory acquisition of land see para 288 ante.

4 Ryde's Scale (1996) was formerly published by the Royal Institution of Chartered Surveyors, and is now published by the Valuation Office. As to the Valuation Office see para 287 ante. Ryde's scale is in use among land surveyors, but there is no custom making it binding upon their employers: *Debenham v King's College, Cambridge* (1884) 1 TLR 170; *Brocklebank v Lancashire and Yorkshire Rly Co* (1887) 3 TLR 575, CA; *Drew v Josolyne* (1888) 4 TLR 717, DC; *Faraday v Tamworth Union* (1916) 86 LJCh 436. For a refusal by the Court of Appeal to apply Ryde's scale in relation to a claim by a surveyor see *Francis v Harris* [1989] 1 EGLR 45, CA.

5 See *LCC v Tobin* [1959] 1 All ER 649, [1959] 1 WLR 354, CA; *Johns v Edmonton Corp* (1958) 9 P & CR 366 at 370, Lands Tribunal.

6 *Beckett v Birmingham Corp* (1956) 6 P & CR 352 at 354. As to the measure of compensation on compulsory acquisition generally see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 235 et seq, 297 et seq (compensation for disturbance). Surveyors' fees may be included in the compensation recoverable by a landowner from an acquiring authority on the withdrawal of a notice to treat: *Duke of Grafton v Secretary of State for Air* (1956) 6 P & CR 374, CA; *Merediths Ltd v LCC* (1957) 9 P & CR 128, Lands Tribunal. As to the recovery of such compensation generally see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 120.

7 See the Supply of Goods and Services Act 1982 s 15(1); *Miller v Beal* (1879) 27 WR 403.

8 Supply of Goods and Services Act 1982 s 15(2). Where a surveyor appears as an expert witness on a client's behalf, a reasonable fee will normally be based upon the surveyor's time and trouble and not upon the value of the property concerned: *Upsdell v Stewart* (1793) Peake 255; *Debenham v King's College, Cambridge* (1884) 1 TLR 170; *Drew v Josolyne* (1888) 4 TLR 717; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436. However, a surveyor may be entitled by a binding custom to a fee assessed on some other basis: *Wilkie v Scottish Aviation Ltd* 1956 SC 198 at 205 obiter per Lord Clyde.

9 *Money Penny v Hartland* (1824) 1 C & P 352; *Whitty v Lord Dillon* (1860) 2 F & F 67; *Sincock v Bangs (Reading)* (1952) 160 Estates Gazette 134; *Hill v Debenham Tewson and Chinnocks* (1958) 171 Estates Gazette 835; *Buckland v Watts* (1968) 208 Estates Gazette 969, CA. Where the services, albeit negligently performed, nevertheless retain some value to the client, he cannot refuse to pay for them: see *Hutchinson v Harris* (1978) 10 BLR 19, CA.

10 *Chong v Scott Collins & Co* (1954) 164 Estates Gazette 662; *Hoadley v Edwards* [2001] EGCS 46.

UPDATE

296-298 Valuer and Client

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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298. Valuer's liability to client.

A valuer will be liable to his client for breach of contract if he fails to carry out any service which he has expressly undertaken to perform¹, or if he breaches an express term of the contract under which he is engaged². In addition, a valuer other than one acting as an arbitrator³ will be liable for breach of an implied term of his contract⁴ if he does not carry out the agreed service with reasonable care and skill⁵, or if he does not carry out that service within a reasonable time⁶.

A valuer who fails to exhibit the requisite standard of professional skill and care may alternatively be liable to the client in negligence⁷.

1 See *Moss v Heckingbottom* (1958) 172 Estates Gazette 207.

2 See generally CONTRACT.

3 As to acting as an arbitrator see para 294 ante.

4 A person who holds himself out as a valuer impliedly represents that he has the necessary skill, knowledge and competence so to act: *Jenkins v Betham* (1855) 15 CB 168; *Harmer v Cornelius* (1858) 5 CBNS 236.

5 Supply of Goods and Services Act 1982 s 13. As to what amounts to reasonable care and skill see paras 302-304 post.

6 Ibid s 14(1). This applies only where the contract does not itself fix either the time for performance or the means by which that time is to be determined: see s 14(1). What is a reasonable time is a question of fact: s 14(2).

7 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 430, [1975] 3 All ER 901 at 917, HL, per Lord Kilbrandon and at 434 and 920 per Lord Salmon; *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 870, [1989] 2 All ER 514 at 540, HL, per Lord Jauncey of Tullichettle; *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 211, [1996] 3 All ER 365 at 370, HL, per Lord Hoffmann. This may benefit the client in terms of the limitation period applicable to his claim: see para 310 post. As to professional negligence see NEGLIGENCE vol 78 (2010) PARA 23.

UPDATE

296-298 Valuer and Client

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(4) VALUER AND THIRD PARTIES

299. Basis of valuer's liability to third parties.

Where a valuer¹ knows² that his report will be shown to a third party who will act in reliance on it, he owes a duty of care in tort to that party³, provided that there is a sufficiently proximate relationship between them⁴. A duty of care may also be owed by a valuer who ought to know, though he does not actually know, that a third party is likely to rely on his report⁵, even if the third party is not actually shown the report⁶, and at least where there is a high degree of probability of such reliance⁷. A valuer does not, however, owe a duty of care to a third party of whose likely reliance he neither knows nor ought to know⁸, and a surveyor employed in relation to one property is not liable to the eventual purchaser of an adjacent property⁹.

1 le other than one acting as an arbitrator: see para 294 ante. For the meaning of 'valuer' see para 283 ante.

2 Such knowledge may be actual or inferential: *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 638, [1990] 1 All ER 568 at 589, HL, per Lord Oliver of Aylmerton.

3 It is not necessary for the valuer to know the identity of the particular third party, so long as he is aware of him as a member of an identifiable class, such as prospective purchaser (*Shankie-Williams v Heavey* [1986] 2 EGLR 139, CA) or prospective mortgagee (*Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86; *Assured Advances Ltd v Ashbee & Co* [1994] EGCS 169).

4 *Cann v Willson* (1888) 39 ChD 39, overruled by *Le Lievre v Gould* [1893] 1 QB 491, CA, but specifically approved in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 865, [1989] 2 All ER 514 at 536, HL, per Lord Griffiths. A sufficiently proximate relationship has been held to exist between a prospective purchaser and a surveyor engaged by the vendor (*Shankie-Williams v Heavey* [1986] 2 EGLR 139, CA; *Bourne v McEvoy Timber Preservation* [1976] 1 EGLR 100) and between a mortgagee, and the mortgagee's insurers, and a valuer engaged by a prospective borrower (*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 per Phillips J; revsd in part on other grounds [1995] QB 375, [1995] 2 All ER 769, CA). It also appears that a surveyor advising a mortgagee on the exercise of a power of sale, following repossession of the mortgaged property, owes a duty of care to the mortgagor to see that the property is not sold at an undervalue: *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA; *Raja v Austin Gray (a firm)* [2002] EWHC 1607 (QB); cf *Huish v Ellis* [1995] NPC 3. However, a marine surveyor employed by a vessel's classification society owes no duty of care to the owner of cargo carried on the vessel: *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211, [1995] 3 All ER 307, HL.

5 See *Bourne v McEvoy Timber Preservation* [1976] 1 EGLR 100; *UCB Bank plc v Dundas & Wilson* 1989 SLT 243; *Wolverhampton Ltd v Herring Son & Daw plc* [1996] EGCS 137 (letter from seller who had instructed the valuer agreed that the plaintiff, the prospective buyer, could rely on valuation as if the plaintiff were a person on whose instruction it had been made).

6 *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Beaumont v Humberts (a firm)* [1990] 2 EGLR 166, CA.

7 'The necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely on his valuation - the evidence was that the surveyors knew that approximately 90% of purchasers did so - and the fact that the surveyor only obtains the work because the purchaser is willing to pay his fee ... I would certainly wish to stress that, in cases where the advice has not been given for the specific purpose of the recipient acting on it, it should only be in cases where the adviser knows that there is a high degree of probability that some other identifiable person will act on the advice that a duty of care should be imposed': *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 865, [1989] 2 All ER 514 at 536, HL, per Lord Griffiths.

8 *Le Lievre v Gould* [1893] 1 QB 491, CA, revsd on other grounds in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL. See also *Beaumont v Humberts* [1990] 2 EGLR 166, CA.

9 *Shankie-Williams v Heavey* [1986] 2 EGLR 139, CA (adjacent flat).

UPDATE

299 Basis of valuer's liability to third parties

NOTE 4--*Raja*, cited, reversed: [2002] EWCA Civ 1965, [2003] 13 EG 117.

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300. Valuation for mortgage purposes.

A valuer who reports on a property for a prospective mortgagee, knowing that a prospective purchaser is likely to rely on his report when deciding whether or not to buy the property, owes a duty of care to that purchaser¹. The purchaser may rely on a valuer's report which is shown to him, and on a report which is not shown to him where it is reasonable for him to assume from the offer of a loan on mortgage that the property has been valued at no less than the amount of the loan². Where, however, the existing owner of a property wishes to raise money on the security of a property (such as by a remortgage or further advance) a valuer who makes a report to the prospective mortgagee cannot be liable to the owner for a negligent over-valuation, since the owner does not suffer a loss merely by receiving the requested loan³.

A mortgagee will be vicariously liable to the purchaser for the negligence of a valuer who is the mortgagee's employee⁴, but will not be so liable for the negligence of an independent valuer whom the purchaser has engaged⁵ unless the mortgagee is in breach of the duty which he owes to the purchaser to take reasonable care to engage a reasonably competent valuer⁶, or he has adopted the valuer's report as his own⁷.

1 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL, approving *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592. A valuer has been held to be more likely to know of the purchaser's reliance where the property valued is comparatively cheap (*Smith v Eric S Bush, Harris v Wyre Forest District Council* supra at 872 and 541 per Lord Jauncey of Tullichettle), but such reliance may be implied in relation to more expensive properties where the evidence and circumstances warrant (*Beaumont v Humberts* [1990] 2 EGLR 166, CA (reinstatement value of house bought for £110,000 in 1984)), or to the purchaser of a small shop (*Qureshi v Liassides* (22 April 1994, unreported; revsd on another point 22 March 1996, unreported, CA)). See also *Merrett v Babb* [2001] EWCA Civ 214, [2001] QB 1174 (valuer owed personal duty of care for negligent valuation report).

2 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592. See also *Nash v Evens & Matta* [1988] 1 EGLR 130 at 132 per Ewbank J (rusty wall-tie in late nineteenth century cavity-walled house only revealed by structural survey two years later; house, owing to age, appearance and absence of cracks had previously been imagined to have solid walls).

3 *Saddington v Colleys Professional Services* [1999] Lloyd's Rep PN 140, CA.

4 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Beaton v Nationwide Building Society* [1991] 2 EGLR 145.

5 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831 at 865, [1989] 2 All ER 514 at 536, HL, per Lord Griffiths. See also *Halifax Building Society v Edell* [1992] Ch 436 at 454 per Morritt J.

6 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831 at 865, [1989] 2 All ER 514 at 536, HL, per Lord Griffiths. See also *Ward v McMaster* [1985] IR 29, Irish HC (careless valuation by valuer for the local authority which lent part of purchase price; house unsafe and recommended to be demolished).

7 See *Beresforde v Chesterfield Borough Council* [1989] 2 EGLR 149, CA.

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(5) EXTENT OF VALUER'S LIABILITY

(i) Liability for Fraudulent Valuation

301. Fraudulent valuation.

A valuer who makes a valuation which is fraudulent, namely one which he knows to be false or which he makes recklessly without regard to whether it is true or false, with the intention that it should be acted upon, is liable to an action of deceit by any person who was intended to act upon that valuation and who acts upon it to his detriment¹. A disclaimer attached to such a valuation will not be effective to exclude or restrict the valuer's liability for fraud². Nor can the defence of contributory negligence be used in an action for deceit, even by one whose liability is purely vicarious and who is not personally guilty of fraud³.

Special provisions apply in relation to the limitation period where a claim against a valuer is based on fraud⁴.

¹ See *Derry v Peek* (1889) 14 App Cas 337, HL; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 755 et seq. As to deceit generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) para 789 et seq.

² See *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351, HL; and *Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd's Rep 360, Aust HC.

³ *Alliance & Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462; *Nationwide Building Society v Thimbleby & Co* [1999] Lloyd's Rep PN 359; *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2000] 2 Lloyd's Rep 511, CA.

⁴ See para 310 post.

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(ii) Professional Standards

302. In general.

The standard which a valuer or surveyor is required to achieve is that of the ordinary skilled person exercising the same skill as himself¹. He is not liable for a mere error of judgment, unless the error was one that no reasonably well-informed and competent member of the profession could have made². The required standard will normally be the same whether a claim is made in contract or tort³, and whether it is made by a client or a third party⁴.

Whether or not a valuer has exercised the required standard of skill and care is a question of fact⁵ on which expert witnesses may be called to give evidence⁶. This question is to be answered in the light of knowledge which is current in the profession at the time of the valuation or survey, with care being taken to guard against hindsight⁷. A valuer will thus be adjudged negligent if he fails to take reasonable steps to keep his professional knowledge up to date⁸. However, failure to comply with guidance notes issued by the relevant professional bodies does not necessarily constitute negligence⁹.

1 See *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121, [1957] 1 WLR 582 at 586 per McNair J. The standard will not be lower because a defendant has no professional qualifications (*Freeman v Marshall & Co* (1966) 200 Estates Gazette 777); nor because he lacks relevant experience (*Kenney v Hall, Pain & Foster* [1976] 2 EGLR 29; *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457 at 459 per Goddard LJ; *Whalley v Roberts and Roberts* [1990] 1 EGLR 164).

2 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220, [1978] 3 All ER 1033 at 1043, HL, per Lord Diplock; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 821 per Phillips J (on appeal [1995] QB 375, [1995] 2 All ER 769, CA).

3 However, the contract under which the valuer is engaged may limit the service which is to be provided, and to which the standard of skill and care will therefore apply: see *Predeth v Castle Phillips Finance Co Ltd* [1986] 2 EGLR 144, CA (surveyor asked for a 'crash sale valuation' held to be under no duty to provide an open market valuation as well); *Sutcliffe v Sayer* [1987] 1 EGLR 155, CA (estate agent asked to advise potential purchaser on asking price held to be under no duty to warn that defects might render property difficult to resell); *Tenenbaum v Garrod* [1988] 2 EGLR 178, CA. Cf *McIntyre v Herring Son & Daw* [1988] 1 EGLR 231. As to the possibility of excluding or restricting liability by contract see para 309 post.

4 The standard will not be lower merely because the valuer does not charge a fee for the service which he carries out (*Kenney v Hall, Pain & Foster* [1976] 2 EGLR 29 at 33 per Goff J) nor because he charges a standard fee, and therefore one which may be low for the work required in valuing some properties (*Roberts v J Hampson & Co* [1989] 2 All ER 504 at 510, [1990] 1 WLR 94 at 101 per Ian Kennedy J).

5 This issue will not as a general rule be suitable to be resolved on an application for summary judgment: *European Partners In Capital (EPIC) Holdings BV v Goddard & Smith* [1992] 2 EGLR 155 at 157, CA, per Scott LJ.

6 As to the power of the court to appoint an expert see *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184, [1996] 2 EGLR 99, CA.

7 *Private Bank & Trust Co Ltd v S (UK) Ltd* [1993] 1 EGLR 144 at 146 per Rice J. See also *Hill v Debenham, Tewson and Chinnocks* (1958) 171 Estates Gazette 835.

8 See *Hooberman v Salter Rex* [1985] 1 EGLR 144; *Peach v Iain G Chalmers & Co* [1992] 2 EGLR 135, Ct of Sess; *Weedon v Hindwood, Clarke & Esplin* [1975] 1 EGLR 82; *Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86.

9 *PK Finans International (UK) Ltd v Andrew Downs & Co Ltd* [1992] 1 EGLR 172 at 174 per Sir Michael Ogden QC. For members of the Royal Institution of Chartered Surveyors and the Institute of Revenues, Rating and Valuation (see para 284 ante), the *RICS Appraisal and Valuation Manual* (1st Edn, 1995) containing both mandatory Practice Statements and non-mandatory Guidance Notes applies to all valuations carried out from 1 January 1996: see para 284 ante.

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303. Valuer's standard of care and skill.

A person who holds himself out or purports to act as a valuer represents himself as having the skill and knowledge which a reasonably competent member of his profession or calling would have¹, and it is his duty to take reasonable care to give a reliable and informed opinion on the open market value of the land in question at the date of valuation². In the absence of special instructions it is not a valuer's duty to advise on future movements in property prices, whether nationally or locally; his concern is with current value only³.

Valuation is not an exact science⁴, but rather a matter of opinion on which competent valuers may reach different conclusions⁵. A valuer is accordingly not guilty of negligence merely because another valuer produces a different answer⁶, nor because his valuation turns out to be wrong⁷. However, a valuation which falls outside a permissible margin of error⁸ brings into question the valuer's competence and the care with which he carried out his task⁹.

A valuer is not negligent merely because he adopts a method of valuation which is not the best¹⁰, provided that it is one which is accepted by a responsible body of opinion among valuers¹¹. A valuer will, however, be negligent if he gives an open market valuation without considering the implications of a recent sale of the property, unless he has been specifically instructed to disregard it¹².

1 *Jenkins v Betham* (1855) 15 CB 168; *Harmer v Cornelius* (1858) 5 CBNS 236. The knowledge which a competent valuer may be expected to possess includes an understanding of the general legal rules governing particular types of valuation (*Jenkins v Betham* (1855) 15 CB 168; *Weedon v Hindwood, Clake & Esplin* [1975] 1 EGLR 82) and an awareness of the state of the property market in general, and, while he is not expected to foresee a general collapse in property prices, his valuation must not contain a substantial speculative element (*Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86 at 92 per Gibson J; *Private Bank & Trust Co Ltd v S (UK) Ltd* [1993] 1 EGLR 144). A valuer is normally expected to be familiar with property values in the relevant locality: *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457 at 459 per Goddard LJ; *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84 per Watkins J; cf *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] 3 All ER 184 at 190-191, CA, per Sir Thomas Bingham MR. See also *Currys Group plc v Martin* [1999] 3 EGLR 165.

2 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 403-404, [1995] 2 All ER 769 at 840, CA, per Sir Thomas Bingham MR. Where it is particularly difficult to arrive at a reliable conclusion as to value (for instance because of a lack of suitable comparable evidence), a valuer may be negligent if he fails to warn the client of this: *Merivale Moore plc v Strutt & Parker* [1999] 2 EGLR 171, CA.

3 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 404, [1995] 2 All ER 769 at 840, CA, per Sir Thomas Bingham MR. However, where a belief among buyers and sellers as to future market movements has an effect on current prices, his valuation should reflect this: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* supra. In advising trustees as to property on the security of which it is proposed to invest trust funds, a valuer must advise as to the amount which it is safe to advance on that property, as well as its actual value: *Shaw v Cates* [1909] 1 Ch 389 at 398; *Re Solomon, Nore v Meyer* [1912] 1 Ch 261 at 274.

4 *Zubaida v Hargreaves* [1995] 1 EGLR 127 at 128, CA, per Hoffmann LJ; *Craneheath Securities Ltd v York Montague Ltd* [1996] 1 EGLR 130 at 132, CA, per Balcombe LJ.

5 *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84 at 85 per Watkins J; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 789 per Phillips J (on appeal [1995] QB 375, [1995] 2 All ER 769, CA).

6 *Zubaida v Hargreaves* [1995] 1 EGLR 127 at 128, CA, per Hoffmann LJ; *Campbell v Edwards* [1976] 1 All ER 785 at 789, [1976] 1 WLR 403 at 408, CA, per Geoffrey Lane LJ.

7 *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457 at 459 per Goddard LJ.

8 This is normally 10% either side of a notional 'right' figure, but can be extended to 15% either way, or a little more, in exceptional circumstances: *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84 at 85 per Watkins J. See also *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 789 per Phillips J (20% 'bracket') (on appeal [1995] QB 375, [1995] 2 All ER 769); *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 1 EGLR 119 at 120, CA, per Staughton LJ.

9 *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84 at 85 per Watkins J. The effect of this is to place the onus on the defendant to prove that he exercised an appropriate degree of skill and care in carrying out the valuation: *Legal & General Mortgage Services Ltd v HPC Professional Services* [1997] PNLR 567 at 574 per Judge Langan QC, approved in *Merivale Moore plc v Strutt & Parker* [1999] 2 EGLR 171 at 176, CA, per Buxton LJ. Conversely, a claimant cannot recover merely because there have been errors at some stages of a valuation, unless the final valuation can also be shown to be wrong: *Craneheath Securities Ltd v York Montague Ltd* [1996] 1 EGLR 130 at 132, CA, per Balcombe LJ; *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 223, [1996] 3 All ER 365 at 381, HL, per Lord Hoffmann. See also *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1 WLR 857, CA.

10 *Love v Mack* (1905) 92 LT 345 at 349-350 per Kekewich J.

11 *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84 at 87-88 per Watkins J. As to valuation methods adopted for different types of property see *Singer & Friedlander Ltd v John D Wood & Co* supra (development sites); *Mount Banking Corp v Brian Cooper & Co* [1992] 2 EGLR 142; *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 1 EGLR 119, CA (residual valuations of development projects); *Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86 (hotels); *Craneheath Securities Ltd v York Montague Ltd* [1994] 1 EGLR 159, CA (restaurants); *Beaumont v Humberts* [1990] 2 EGLR 166, CA (insurance); *McIntyre v Herring Son & Daw* [1988] 1 EGLR 231 (rating); and *Zubaida v Hargreaves* [1995] 1 EGLR 127, CA (rent reviews).

12 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 789-791 per Phillips J (on appeal [1995] QB 375, [1995] 2 All ER 769, CA).

UPDATE

303 Valuer's standard of care and skill

NOTE 2--See *Montlake (as trustees of Wasps Football Club) v Lambert Smith Hampton Group Ltd* [2004] EWHC 938 (Comm), [2004] 20 EG 167 (CS); and *Platform Funding Ltd v Bank of Scotland plc* [2008] EWCA Civ 930, [2009] 2 All ER 344.

NOTE 9--See *Goldstein v Levy Gee (a firm)* [2003] EWHC 1574 (Ch), (2003) Times, 16 July.

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304. Surveyor's standard of care and skill.

A surveyor's duty is to survey the property to the standard of a reasonably competent surveyor exercising due skill, care and diligence and possessing the necessary knowledge and experience¹. The extent to which this requires the use of special equipment is a question of fact².

In the absence of contrary agreement, a surveyor is normally expected to inspect all parts of the property which are visible³, but not to uncover or open up those parts which are not visible⁴. However, a surveyor whose inspection reveals grounds for suspecting the existence of defects must take reasonable steps to follow the trail of suspicion⁵.

1 *Kerridge v James Abbott & Partners* [1992] 2 EGLR 162. The extent and depth of inspection which is expected will depend on the type of survey to be carried out, although a surveyor must show the same level of expertise even when carrying out a limited inspection: *Cross v David Martin & Mortimer* [1989] 1 EGLR 154 at 155 per Phillips J. As to the limited inspection which is required in carrying out a mortgage valuation see *Roberts v J Hampson & Co* [1989] 2 All ER 504, [1990] 1 WLR 94; *Lloyd v Butler* [1990] 2 EGLR 155 at 160 per Henry J.

2 See, for example, *Fryer v Bunney* [1982] 2 EGLR 130 (surveyor negligent for failure to make sufficient use of a damp meter); *Eley v King & Chasemore* [1989] 1 EGLR 181, CA (surveyor not negligent for inspecting roof from ground level, rather than obtaining a long ladder); *Hacker v Thomas Deal & Co* [1991] 2 EGLR 161 (surveyor not negligent in failing to use torch and mirror to check behind cupboards for damp; RICS guidelines specifically stated that use of mirror was a matter of individual preference).

3 See *Hill v Debenham, Tewson & Chinnocks* (1958) 171 Estates Gazette 835; *Stewart v HA Brechin & Co* 1959 SC 306, Ct of Sess.

4 *Roberts v J Hampson & Co* [1989] 2 All ER 504 at 510, [1990] 1 WLR 94 at 101 per Ian Kennedy J.

5 *Roberts v J Hampson & Co* [1989] 2 All ER 504, [1990] 1 WLR 94; *Lloyd v Butler* [1990] 2 EGLR 155; *Sneesby v Goldings* [1995] 2 EGLR 102, CA. Such reasonable steps may not require the surveyor 'to follow up every trail to discover whether there is trouble or the extent of any such trouble. But where such an inspection can reasonably show a potential trouble or risk of potential trouble ... it is necessary ... to alert the purchaser to that risk': *Lloyd v Butler* [1990] 2 EGLR 155 at 161 per Henry J.

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(iii) Damages

305. Damages for negligent valuation; in general.

In order to recover damages¹ in respect of a negligent valuation, a claimant must establish that he has suffered loss or damage which the valuer's negligence caused or to which it contributed². In normal circumstances, proof of the necessary causal link will require evidence that the claimant acted in reliance on information provided by the valuer³. Where such reliance is established, the damages awarded for a negligent valuation are such as would fairly and reasonably be considered as resulting⁴ from the failure of the valuer to report as he should have done, had he used due care⁵. In particular, the damages should not impose upon the valuer responsibility for losses which would have occurred even if the valuation had been correct⁶.

Damages awarded in cases of negligent valuation will not extend to any part of the claimant's loss which the claimant ought reasonably to have avoided⁷. Damages may also be reduced where the claimant's loss is offset by benefit he has received⁸.

Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and: (1) in the case of any sum paid before judgment, the date of the payment; and (2) in the case of the sum for which judgment is given, the date of the judgment⁹. Where damages are awarded against a negligent valuer, the court will normally exercise its statutory discretion to order that the damages are to bear simple interest¹⁰.

1 le other than nominal damages, which may be awarded in a claim for breach of contract whether or not the breach has caused any loss: see further CONTRACT; DAMAGES.

2 *Thomas Miller & Co v Richard Saunders & Partners* [1989] 1 EGLR 267 at 272 per Rougier J (tenant's surveyor who negligently failed to put forward relevant evidence at a rent review arbitration was held not liable for his client's losses, since the court was satisfied that the evidence in question would not have altered the arbitrator's decision).

3 See *Rona v Pearce* (1953) 162 Estates Gazette 380; *Shankie-Williams v Heavey* [1986] 2 EGLR 139, CA (actions against surveyors failed for lack of such evidence). However, it is not necessary for the claimant to have relied exclusively upon information from the defendant, provided that it played a real and substantial part in inducing him to act as he did: *Kenney v Hall, Pain & Foster* [1976] 2 EGLR 29 at 35 per Goff J; *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231 at 234 per Wright J; *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583 at 589, CA, per Stephenson LJ; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 794 per Phillips J. A purchaser who has agreed to pay more for property than the value placed on it by his surveyor may nevertheless be held to have relied upon the surveyor's report: *Oswald v Countrywide Surveyors Ltd* [1996] 2 EGLR 104, 50 ConLR 1, CA; and see para 306 note 7 post. In order to establish a valuer's liability, where the property valued was not identical to the property secured, the court must ask whether the purpose for which the claimant used the valuation was a purpose which the valuer would reasonably have contemplated: *Western Trust and Savings Ltd v Strutt & Parker* [1998] 3 EGLR 89, CA. See also *Cavendish Funding Ltd v Henry Spencer & Sons Ltd* [1998] 1 EGLR 104, CA (lender who based lending decision on higher of two independent valuations had sufficiently relied on that valuation to hold valuer liable).

4 As to what losses may be said to have resulted from such failure see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 405-431, [1995] 2 All ER 769 at 841-864, CA, per Sir Thomas Bingham

MR; but cf *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 212-218, [1996] 3 All ER 365 at 371-376, HL, per Lord Hoffmann; and see para 307 post.

5 *Philips v Ward* [1956] 1 All ER 874 at 878, [1956] 1 WLR 471 at 475, CA, per Morris LJ. As to the kind of losses which a valuer might reasonably be expected to foresee, and which are therefore not too remote a consequence of his negligence see *Morgan v Perry* (1973) 229 Estates Gazette 1737; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 405, [1995] 2 All ER 769 at 840, CA, per Sir Thomas Bingham MR (but see note 4 supra); *Drinnan v CW Ingram & Sons* 1967 SLT 205; *Allen v Ellis & Co* [1990] 1 EGLR 170 (survey report failed to mention roof in poor condition; it leaked; owner investigated and fell through; valuer liable for owner's injuries). As to the correct measure of damages for negligent advice on the value of property for insurance purposes see *Beaumont v Humberts* [1990] 2 EGLR 166, CA.

6 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 214, [1996] 3 All ER 365 at 371, HL, per Lord Hoffmann (a duty of care which imposed such responsibility would not be fair and reasonable and could not therefore be justified either as an implied term of a contract or as a tortious duty). As to earlier law see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375, [1995] 2 All ER 769, CA. However, a different result might be justified if the valuer were engaged, not merely to provide information, but to advise on the suitability of a proposed transaction, as he would then be responsible not merely for all the foreseeable consequences of the information being wrong, but for all the foreseeable loss which is a consequence of that course of action having been taken: *South Australia Asset Management Corp v York Montague Ltd* supra at 214-215 and 372-373 per Lord Hoffmann.

7 As to the doctrine of mitigation of damage see DAMAGES vol 12(1) (Reissue) para 1041 et seq. As to the operation of this principle in the context of negligent valuations see paras 306 note 11, 307 note 6 post.

8 Eg, a mortgage lender who claims damages from a negligent valuer must bring into account the amount realised by a sale of the mortgaged property, and also any repayments made by the borrower prior to default: see para 307 text and notes 3-6 post. However, the principle of 'res inter alios acta' means that a claimant need not bring into account the proceeds of an insurance policy: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 per Phillips J (on appeal [1995] QB 375, [1995] 2 All ER 769, CA). Nor need he bring into account a discretionary statutory grant given by a local authority to enable the claimant to repair defective property. 'I am clearly of the view that the sum does not fall to be deducted. Firstly, because it is irrelevant to a claim where the difference in value is the measure of damage and, secondly, because, to use legal shorthand, it is a collateral benefit which does not have to be taken into account': *Trembl v Ernest W Gibson and Partners* [1984] 2 EGLR 162 at 164 per Popplewell J. See also *Gardner v Marsh & Parsons (a firm)* [1997] 3 All ER 871, [1997] 1 WLR 489, CA; and para 306 note 5 post.

9 Supreme Court Act 1981 s 35A(1) (added by the Administration of Justice Act 1982 s 15(1), Sch 1 Pt 1). Thus the court's discretion extends to both the rate of interest awarded and the period over which it is to be calculated.

10 The court has refused to interfere with a trial judge's decision to apply the rate of interest laid down under the Judgments Act 1838 for interest on judgment debts, even where it considers that it would have been preferable to apply a rate of interest reflecting the cost or value of money over the relevant period: *Watts v Morrow* [1991] 4 All ER 937 at 960, [1991] 1 WLR 1421 at 1446, CA, per Bingham LJ.

UPDATE

305 Damages for negligent valuation; in general

TEXT AND NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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306. Measure of damages in claim by purchaser or vendor.

The proper measure of damages is the difference between what the property would have been worth¹ had it been in the condition in which the valuer represented it² and its actual value³, which should have been reported to the party who relied on the valuer's report⁴. This remains the case even where the purchaser, acting reasonably to cut his losses, sells the property for more than he paid before the valuer admits liability or is found liable⁵. If, despite the negligent valuation, the purchaser paid no more than the property was worth in its actual condition, only nominal damages will be awarded⁶. If the purchaser chose to pay more than the property would have been worth had it been in the condition in which the valuer represented it, the valuer or surveyor is not liable for that excess⁷. Damages are assessed according to the difference in 'as represented' and 'actual' values which obtained when the purchaser became legally committed to the purchase, and the damages bear interest from that date until the date of judgment⁸.

The purchaser is not entitled to recover the cost of repairing defects which the valuer or surveyor has negligently overlooked⁹, although the cost of such repairs may be relevant evidence when assessing what the property is actually worth in its defective condition¹⁰.

If the purchaser decides to dispose of the defective property, he will also be entitled to recover damages in relation to certain incidental losses, such as legal fees and other costs, occasioned by both the purchase and the resale¹¹. If he decides to retain the property and rectify its defects, he will probably be entitled to recover in respect of reasonable incidental expenses, such as fees incurred in investigating the defects and the cost of alternative accommodation while repairs are being carried out¹², but damages are not recoverable for the cost of the repair work itself¹³.

The damages recoverable from a negligent surveyor or valuer by the purchaser of a dwelling may include a sum for physical inconvenience and discomfort¹⁴ caused by the breach of duty and for mental suffering directly related to that inconvenience and discomfort¹⁵. That sum will reflect the amount and duration of the discomfort¹⁶, but it should in any event be modest and not excessive¹⁷.

Where a vendor sells property at an undervalue in reliance on advice negligently given to him by a valuer, the vendor may recover the difference between the market value of the property and the price for which he sold it¹⁸.

1 This, in most cases, is the price paid, at least where no point is taken that the claimant chose to pay above market value: see *Watts v Morrow* [1991] 4 All ER 937 at 945, [1991] 1 WLR 1421 at 1430, CA, per Ralph Gibson LJ.

2 The claimant's damages will be reduced if in fact he bought it for less than this figure, as he will have suffered a correspondingly smaller loss, and if he bought it for so much less that he turns out to have paid no more than the property's actual value, he will get nominal damages only: see the text and notes 4-6 *infra*.

3 This figure should be that which the court considers it most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold on the open market; it is not the highest possible valuation which would not have been negligent: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 221-222, [1996] 3 All ER 365 at 379, HL, per Lord Hoffmann.

4 See *Philips v Ward* [1956] 1 All ER 874 at 876, [1956] 1 WLR 471 at 473, CA, per Denning LJ; *Ford v White & Co* [1964] 2 All ER 755 at 758-761, [1964] 1 WLR 885 at 888-892 per Pennycuik J (plaintiffs bought house and vacant plot, with building restriction against the plot, at actual value; solicitor negligently failed to tell

plaintiffs of restriction; held that plaintiffs had suffered no loss as the difference between the price paid and the property's actual value was nil; they were therefore in the same position as if the defendants had fulfilled their duty and so were not entitled to damages; the plaintiffs' claim in the case arose in contract, and not in tort, and agreement between the parties as to the measure of damage in the event of the court so deciding precluded an award of nominal damages); *Perry v Sidney Phillips & Son (a firm)* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Watts v Morrow* [1991] 4 All ER 937 at 945-954, [1991] 1 WLR 1421 at 1429-1439, CA, per Ralph Gibson LJ. See also *Gardner v Marsh & Parsons (a firm)* [1997] 3 All ER 871, [1997] 1 WLR 489, CA; *Smith v Peter North & Partners* [2001] EWCA Civ 1553, [2002] 1 P & CR 480.

5 *Perry v Sidney Phillips & Son (a firm)* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA (house, though defective, was sold unrepaired for more than the plaintiff paid for it); and see the text and note 8 *infra*. See also *Gardner v Marsh & Parsons (a firm)* [1997] 3 All ER 871, [1997] 1 WLR 489, CA.

6 *Upstone v GDW Carnegie & Co* 1978 SLT (Sh Ct) 4. See also *Smith v Peter North & Partners* [2001] EWCA Civ 1553, [2002] 1 P & CR 480.

7 *Hardy v Wamsley-Lewis* (1967) 203 Estates Gazette 1039; but see *Oswald v Countrywide Surveyors Ltd* [1996] 2 EGLR 104, CA (plaintiffs paid £225,000 for property valued at £215,000; surveyor advised caution on woodworm but failed to notice death watch beetle; plaintiffs said they would have paid £165,000 for the property in its actual condition; on appeal held that it was open for the judge to decide as a matter of fact that the price paid by the plaintiffs was the best evidence of its market value in the condition in which the surveyor represented it, and that one could have regard to the cost of repairs in calculating its actual market value; allowance was made for betterment resulting from repairs).

8 *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; and see para 305 text and notes 9-10 *ante*.

9 *Philips v Ward* [1956] 1 All ER 874, [1956] 1 WLR 471, CA; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA; *Smith v Peter North & Partners* [2001] EWCA Civ 1553, [2002] 1 P & CR 480. See also *Patel v Hooper & Jackson (a firm)* [1999] 1 All ER 992, [1999] 1 WLR 1792, CA.

10 *Steward v Rapley* [1989] 1 EGLR 159, CA. As to the position where a purchaser of a lease subsequently discovers that it contains terms to his disadvantage about which he was not warned see *Simple Simon Catering Ltd v Binstock Miller & Co* (1973) 228 Estates Gazette 527 at 529, CA, per Lord Denning MR.

11 *Philips v Ward* [1956] 1 All ER 874 at 879, [1956] 1 WLR 471 at 478, CA, per Romer LJ; *Watts v Morrow* [1991] 4 All ER 937 at 950, [1991] 1 WLR 1421 at 1435, CA, per Ralph Gibson LJ and at 959 and 1445 per Bingham LJ; *Heatley v William H Brown Ltd* [1992] 1 EGLR 289 at 296 per Peter Bowsher J, QC. A purchaser who decides to sell the defective property may also be entitled to recover costs incurred through renting alternative accommodation: *Patel v Hooper & Jackson (a firm)* [1999] 1 All ER 992, [1999] 1 WLR 1792, CA.

12 See eg *Morgan v Perry* (1973) 229 Estates Gazette 1737; *Trembl v Ernest W Gibson and Partners* [1984] 2 EGLR 162; *Cross v David Martin & Mortimer* [1989] 1 EGLR 154 at 159 per Phillips J.

13 See note 9 *supra*.

14 'If the cause of the inconvenience or discomfort is a sensory (sight, touch, hearing, smell etc) experience, damages can, subject to the remoteness rule, be recovered': *Farley v Skinner* [2001] UKHL 49 at [85], [2001] 4 All ER 801 at [85] per Lord Scott of Foscote (damages awarded for aircraft noise).

15 *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA (inconvenience, distress and discomfort); *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA (damages awarded for distress caused by physical consequences of breach but not for mental distress not caused by physical discomfort or inconvenience resulting from the breach); *Ezekiel v McDade* [1995] 2 EGLR 107 at 110, CA, per Nourse LJ. Damages may be awarded for discomfort foreseeably suffered during the period when defects in the property are repaired even though the cost of repairs is not itself recoverable: *Watts v Morrow* [1991] 4 All ER 937 at 960, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ. In the absence of such physical discomfort a surveyor or valuer is not normally liable for distress, frustration, anxiety, displeasure, vexation, tension or aggravation suffered by the purchaser: *Perry v Sidney Phillips & Son* [1982] 3 All ER 705 at 712, [1982] 1 WLR 1297 at 1307, CA, per Kerr LJ; *Watts v Morrow* *supra* at 956-957, 959 and 1442, 1445 per Bingham LJ. However, damages may be awarded for such consequences where a major object of a contract for a survey is the provision of pleasure, relaxation or peace of mind: *Farley v Skinner* [2001] UKHL 49, [2001] 4 All ER 801 (surveyor held negligent for breach of specific undertaking to investigate possibility of aircraft noise affecting property).

16 *Watts v Morrow* [1991] 4 All ER 937 at 958, [1991] 1 WLR 1421 at 1443, CA, per Ralph Gibson LJ. A purchaser may be precluded by the doctrine of mitigation from recovering damages for discomfort suffered after the time when he ought reasonably to have repaired defects in the property: *Cross v David Martin &*

Mortimer [1989] 1 EGLR 154 at 159 per Phillips J. However, where the defendant persists in denying liability, a purchaser does not act unreasonably in failing to carry out repairs which he lacks the means to pay for: *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA, distinguishing *Liesbosch (Owners) v SS Edison (Owners)* [1933] AC 449, HL.

17 *Perry v Sidney Phillips & Son* [1982] 3 All ER 705 at 709, [1982] 1 WLR 1297 at 1303, CA, per Lord Denning MR. Awards under this head have, however, been reduced on appeal: see *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA; *Ezekiel v McDade* [1995] 2 EGLR 107, CA.

18 *Weedon v Hindwood, Clarke & Esplin* [1975] 1 EGLR 82 (valuer negligently agreed too low a figure with the district valuer for the compulsory acquisition of his client's property); *Kenney v Hall, Pain & Foster* [1976] 2 EGLR 29 (valuer negligently over-estimated potential sale price of property; intending vendor relied on over-estimation when taking on other financial commitments; valuer liable for losses arising out of those commitments).

UPDATE

306 Measure of damages in claim by purchaser or vendor

NOTE 18--See *Montlake (as trustees of Wasps Football Club) v Lambert Smith Hampton Group Ltd* [2004] EWHC 938 (Comm), [2004] 20 EG 167 (CS).

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307. Measure of damages in claim by mortgage lender.

Where a valuer negligently values a property and a lender consequently agrees to advance money on the security of that property, the lender will not be able to recover damages greater than the amount by which the property has been overvalued because, in the absence of fraud, the valuer is responsible only for the foreseeable consequences of the valuation being wrong, and not for all the consequences of the loan having been made¹. Where the lender would not have lent if he had known the property's actual value, and suffers losses because the value of the property falls after the mortgage has been taken out, he cannot recover for those losses if they exceed the amount of the overvaluation².

Generally, the basic measure of damages recoverable by the lender in a case where, had the valuation been accurate, he would not have lent at all will consist of the entire amount which has been lent³, together with all costs reasonably incurred in repossessing and reselling the mortgaged property⁴, less whatever is recovered on the resale and any repayments of capital or interest made by the borrower⁵. The basic measure of damages recoverable by the lender in a case where, had the valuation been accurate, he would have lent a smaller amount will consist of the difference between what has been lent and lost and the smaller amount which would have been lent and lost if the valuer had provided an accurate valuation of the property, less any repayments of capital or interest made by the borrower⁶.

In addition to these capital sums, the lender is entitled to damages to compensate him for the interest which he could have earned on the money had it not been locked up in the mortgage loan⁷, although such damages will not reflect the high contractual rate provided for in the actual mortgage unless the lender can show that, had he not lent to the borrower in question, the money would in fact have earned interest at a comparable rate on another loan⁸. A lender is not, however, entitled to damages based on the cost of repairing the property⁹.

1 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL. However, where a valuer is engaged not merely to provide information, but to advise a lender as to whether or not a loan should be made, the valuer's responsibility for negligent advice will extend to all the foreseeable loss which is a consequence of the loan being made, including that which results from a subsequent fall in the value of the property: *South Australia Asset Management Corp v York Montague Ltd* supra at 214-215 and 372 per Lord Hoffmann. See also *Western Trust and Savings Ltd v Strutt & Parker* [1998] 3 EGLR 89, CA (see para 305 note 3 ante).

2 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL, per Lord Hoffmann (overruling *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375, [1995] 2 All ER 769, CA). '[A negligent valuer] is not liable for consequences which would have arisen even if the advice had been correct ... because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound. As such they are not within the scope of the duty owed to the lender by the valuer': *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 at 309, [1997] 1 WLR 1627 at 1631, HL, per Lord Nicholls of Birkenhead.

3 *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457; affd [1939] 2 KB 271, [1939] 2 All ER 752, CA. Damages should not be assessed at the date of breach and should not reflect the difference between the amount of the loan and the value of the lender's rights under the mortgage: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL.

4 *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457; affd [1939] 2 KB 271, [1939] 2 All ER 752, CA; *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL.

5 *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA; see also *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 818 per Phillips J (on appeal [1995] QB 375, [1995] 2 All ER 769, CA). It has been held that the lender will not be required to give credit for sums which could have been, but which have not been, received (either from sale of the property or by taking action against the borrower on his personal covenant to pay) unless the lender is guilty of failing to take reasonable steps to mitigate his loss: *London and South of England Building Society v Stone* supra (personal covenant not enforced in order to protect commercial reputation), overruling *Eagle Star Insurance Co Ltd v Gale and Power* (1955) 166 Estates Gazette 37; *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143 (failure to accept an offer for the property). However, it is not clear how far this principle is affected by the view expressed by Lord Nicholls of Birkenhead that the lender must bring into account the value of the borrower's covenant to repay: see *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 at 309, [1997] 1 WLR 1627 at 1631, HL.

6 *Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86. In this situation the lender will not be entitled to recover the costs of repossessing and reselling the mortgaged property, since these would have been incurred in any event: *Corisand Investments Ltd v Druce & Co* supra at 101 per Gibson J.

7 *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL (overruling on this point *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457; affd [1939] 2 KB 271, [1939] 2 All ER 752, CA).

8 As to the appropriate rate of interest to be adopted in assessing damages see *Swingcastle Ltd v Alastair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL; *Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86; *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375, [1995] 2 All ER 769, CA. The date on which the lender's cause of action arises, and from which interest on damages may be awarded under the Supreme Court Act 1981 s 35A(1) (as added) (see para 305 ante), is the date on which the lender actually suffers the loss attributable to the valuer's breach of duty; this will vary according to the facts of the case: *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, HL.

9 *London & South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA.

UPDATE

307 Measure of damages in claim by mortgage lender

NOTE 8--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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308. Reduction of damages for contributory negligence.

Where a person who claims damages in respect of an inaccurate valuation is contributorily negligent, the damages recoverable may be reduced to such extent as the court thinks just and equitable¹. A person may be contributorily negligent for this purpose where it is unreasonable for him to place reliance on the valuation in question². In addition, a person who relies on a negligent valuation in deciding to enter into a transaction may be contributorily negligent if his decision to enter into that transaction is unreasonable on other grounds³.

1 See the Law Reform (Contributory Negligence) Act 1945 s 1(1). The Law Reform (Contributory Negligence) Act 1945 applies to claims in tort for negligence, and also to claims for breach of a contractual duty of care (which is the same as a duty which would arise in tort irrespective of any contract): *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA. However, it does not apply to a claim for breach of a contractual provision which does not depend on negligence by the defendant (*Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA) or to an action in deceit arising out of a fraudulent valuation (*Alliance & Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462). See also *Nationwide Building Society v Thimbleby & Co* [1999] Lloyd's Rep PN 359; *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2000] 2 Lloyd's Rep 511, CA. As to contributory negligence see NEGLIGENCE vol 78 (2010) PARA 75 et seq.

The percentage reduction for contributory negligence should be applied to the lender's basic loss before any reduction for the loss exceeding the extent of the overvaluation is made: *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, [1999] 1 All ER 833, HL.

2 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 per Phillips J (on appeal [1995] QB 375, [1995] 2 All ER 769, CA); *Nykeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143 (the damages awarded against a negligent valuer were reduced on proof that the plaintiff mortgage lender was aware of a substantial discrepancy between the valuation on which reliance was placed and the price at which the subject property had just been sold on the open market); *Cavendish Funding Ltd v Henry Spencer & Sons Ltd* [1998] 1 EGLR 104, CA (lender who based lending decision on higher of two independent valuations held contributorily negligent in failing to investigate discrepancy between the valuations). See also *PK Finans International (UK) Ltd v Andrew Downs & Co Ltd* [1992] 1 EGLR 172 (had the plaintiff lenders succeeded in establishing negligence against the defendant valuers, the court would have in any event held the plaintiffs responsible for 80% of their losses). As to the difficulty in establishing that a house purchaser has acted unreasonably in relying on a valuation or survey see *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592; *Davies v Parry* [1988] 1 EGLR 147; *Allen v Ellis & Co* [1990] 1 EGLR 170 at 172 per Garland J.

3 Eg where a mortgage lender has substantial reason for doubting the honesty or financial stability of the proposed borrower (see *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231 at 235 obiter per Wright J; *United Bank of Kuwait plc v Prudential Property Services Ltd* [1995] EGCS 190, CA; *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 576, NZ CA); or where the amount lent represents an unreasonably high proportion of the estimated value of the property (*Platform Home Loans Ltd v Oyston Shipways Ltd* [1996] 2 EGLR 110; affd [2000] 2 AC 190, [1999] 1 All ER 833, HL).

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(iv) Limitations on Liability

309. Exclusion or restriction of liability.

In principle, a valuer may: (1) exclude or restrict his liability for negligently causing financial loss to his client by means of an appropriate term in the contract under which he is engaged¹; and (2) exclude or restrict his liability for negligently causing financial loss to a third party by means of an appropriate notice or disclaimer².

In either case the exclusion or restriction of liability must be reasonable in the circumstances³, since a disclaimer of liability by or on behalf of a valuer is a notice which purports to exclude liability for negligence within the meaning of the Unfair Contract Terms Act 1977⁴. As such it is unlikely to be effective against a purchaser of an ordinary house where the valuer is instructed by the building society⁵, although it might be effective in relation to those unusual residential or commercial properties whose purchasers are not generally expected to behave as the purchaser of an ordinary house would behave⁶.

1 As to exclusion clauses generally see CONTRACT vol 9(1) (Reissue) para 797 et seq.

2 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *Hadden v City of Glasgow District Council* 1986 SLT 557, Ct of Sess; *Bank of Scotland v Fuller Peiser* 2002 SLT 574, Ct of Sess. To be effective, such a notice must be brought to the attention of the third party before he acts in reliance on the valuation: *Martin v Bell-Ingram* 1986 SLT 575, Ct of Sess.

3 See the Unfair Contract Terms Act 1977 s 2; and CONTRACT vol 9(1) (Reissue) para 822. In the case of a contract term, it must be shown that the term was a fair and reasonable one to have been included, having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made: s 11(1). In relation to a notice not having contractual effect, the requirement of reasonableness under the Unfair Contract Terms Act 1977 is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or, but for the notice, would have arisen: s 11(3). In either case, it is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does: s 11(5).

4 See *ibid* s 2(2). Such a disclaimer is therefore ineffective by reason of s 2(2) unless it satisfies the test of reasonableness provided by s 11(3): see the text and note 3 *supra*. These provisions do not extend to Scotland: see s 32(2).

5 *Roberts v J Hampson & Co (a firm)* [1989] 2 All ER 504 at 510, [1990] 1 WLR 94 at 101 per Ian Kennedy J; *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

6 *Smith v Eric S Bush*, *Harris v Wyre Forest District Council* [1990] 1 AC 831 at 857, [1989] 2 All ER 514 at 531-532, HL; *Beaton v Nationwide Building Society* [1991] 2 EGLR 145; *Stevenson v Nationwide Building Society* [1984] 2 EGLR 165 at 170 per Wilmer J, QC (the purchaser of a relatively substantial commercial property was an estate agent who was familiar with disclaimers; held that it was reasonable for the mortgage valuer to disclaim liability for negligence). See also *Omega Trust Co Ltd v Wright Son & Pepper* [1997] 1 EGLR 120, CA; *Bank of Scotland v Fuller Peiser* 2002 SLT 574, Ct Sess.

UPDATE

309-310 Exclusion or restriction of liability, Limitation periods applicable to claim against valuer

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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310. Limitation periods applicable to claim against valuer.

A claim against a valuer for breach of contract may not be brought after the expiration of six years from the date on which the cause of action accrued¹, that is, the date on which the breach of contract occurred². A claim against a valuer which is founded on tort³ may not be brought after the expiration of six years from the date on which the cause of action accrued⁴, that is, the date on which the claimant suffered loss or damage⁵.

A special time limit applies to any action for damages for negligence⁶ where certain facts are not known to the claimant, or any person in whom the cause of action was previously vested⁷, at the date on which the cause of action accrues⁸. In such circumstances the claim must be brought either within six years of the date on which the cause of action accrued⁹ or, if this period would expire later, within three years of the date on which the claimant or any person in whom the cause of action was vested before him first had both the necessary knowledge¹⁰ and the right to bring the claim¹¹. However, such a claim may not be brought after the expiration of 15 years from the occurrence of the act or omission which is alleged to constitute negligence¹².

Subject to certain exceptions¹³, where, in the case of any action for which a period of limitation is prescribed by the Limitation Act 1980¹⁴, either (1) the claim is based upon the fraud of the defendant¹⁵; or (2) any fact relevant to the claimant's right of action has been deliberately concealed¹⁶ from him by the defendant; or (3) the claim is for relief from the consequences of a mistake, the period of limitation will not begin to run until the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it¹⁷. For these purposes, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty¹⁸.

1 Limitation Act 1980 s 5. As to limitation periods see further LIMITATION PERIODS.

2 If the contract in question is made by deed, the limitation period is 12 years: see *ibid* s 8.

3 As to the special time limit applicable to actions in tort for negligence where certain facts relevant to the cause of action are not known at the date of accrual see the text and notes 6-12 *infra*.

4 Limitation Act 1980 s 2. As to when the limitation period will begin where fraud is concealed see *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102, [1995] 2 All ER 558, HL; *Westlake v Bracknell District Council* [1987] 1 EGLR 161 (valuer deliberately concealed the fact that his earlier inspection of a property had been negligently carried out); and the text and notes 13-18 *infra*.

5 Identification of relevant loss or damage is a question of fact: *Kitney v Jones Lang Wootton* [1988] 1 EGLR 145; *Whitley (FG) & Sons Co Ltd v Thomas Bickerton* [1993] 1 EGLR 139. A purchaser or tenant who relies on a negligent valuation or survey generally suffers loss for this purpose on entering into a binding contract to acquire the property: *Secretary of State for the Environment v Essex, Goodman & Suggitt* [1986] 2 All ER 69, [1985] 2 EGLR 168; *Spencer-Ward v Humberts* [1995] 1 EGLR 123, CA; *Byrne v Hall Pain & Foster* [1999] 2 All ER 400, [1999] 1 WLR 1849, CA. Where a mortgagee would not have lent money but for a negligent over-valuation of the mortgaged property, the mortgagee's loss is suffered at the moment when the amount outstanding on the mortgage (including accrued interest) first exceeds the value of the lender's rights: *First National Commercial Bank plc v Humberts* [1995] 2 All ER 673, [1995] 1 EGLR 142, CA; *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL.

6 le an action in tort: *Iron Trades Mutual Insurance Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808, [1989] 2 Lloyd's Rep 85; *Société Commerciale de Réassurance v ERAS (International) Ltd, Re ERAS EIL appeals* [1992] 2 All ER 82n, [1992] 1 Lloyd's Rep 570, CA.

7 See the Limitation Act 1980 s 14A(5) (s 14A added by the Latent Damage Act 1986 s 1).

8 See the Limitation Act 1980 s 14A (as added: see note 7 supra); and LIMITATION PERIODS vol 68 (2008) PARA 982. As to the knowledge which is relevant for this purpose see s 14A(6)-(10) (as so added); note 10 infra; and LIMITATION PERIODS vol 68 (2008) PARA 982.

9 See the text and notes 4-5 supra.

10 For these purposes, a person's knowledge includes knowledge which he might reasonably have been expected to acquire: (1) from facts observable or ascertainable by him; or (2) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek; but a person is not to be taken by virtue of the Limitation Act 1980 s 14A(10) (as added) to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice: s 14A(10) (as added: see note 7 supra). As to the degree of knowledge required to 'trigger' the three-year period see *Spencer-Ward v Humberts* [1995] 1 EGLR 123, CA. It is irrelevant that the claimants do not know the identity of the negligent valuer when a simple inquiry would have revealed it: *Heathcote v David Marks & Co* [1996] 1 EGLR 123. A negligent valuation or survey gives rise to a single cause of action, and the claimant's knowledge of one defect which has been negligently overlooked therefore causes the three-year period to run in respect of all defects, including those which are discovered subsequently: *Hamlin v Edwin Evans* [1996] 2 EGLR 106, CA. See also *Mortgage Corp'n v Lambert & Co* [2000] BLR 265, CA.

11 See the Limitation Act 1980 s 14A(5) (as added: see note 7 supra); and LIMITATION PERIODS vol 68 (2008) PARA 982.

12 See *ibid* s 14B (added by the Latent Damage Act 1986 s 1); and LIMITATION PERIODS vol 68 (2008) PARA 982.

13 le the Limitation Act 1980 s 32(3), (4A) (as added) (time limits in relation to defective products and fatal accidents): see LIMITATION PERIODS vol 68 (2008) PARAS 1220, 1222.

14 As to the limitation periods prescribed by the Limitation Act 1980 generally see LIMITATION PERIODS.

15 References in *ibid* s 32(1) (as amended) to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent: s 32(1) (amended by the Consumer Protection Act 1987 s 6, Sch 1 para 5).

16 Deliberate concealment of facts relevant to a cause of action will postpone the running of time until the concealment is or should be discovered, regardless of whether it is concealed when the cause of action accrues or afterwards: *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102, [1995] 2 All ER 558, HL.

17 Limitation Act 1980 s 32(1) (as amended: see note 15 supra).

18 *Ibid* s 32(2). See *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2002] 2 All ER 641. Nothing in the Limitation Act 1980 s 32 (as amended) enables any action: (1) to recover, or recover the value of, any property; or (2) to enforce any charge against, or set aside any transaction affecting, any property, to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place: s 32(3). A purchaser is an innocent third party for the purposes of s 32 (as amended): (a) in the case of fraud or concealment of any fact relevant to the claimant's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and (b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made: s 32(4).

UPDATE

309-310 Exclusion or restriction of liability, Limitation periods applicable to claim against valuer

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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(6) EMPLOYMENT OF QUANTITY SURVEYORS

311. Relationship between quantity surveyor and employer.

The employer, or the architect as his agent, employs a quantity surveyor and is liable for his fees¹. The quantity surveyor owes a duty of care to the employer to perform his work skilfully².

¹ For the authority of the architect to employ a quantity surveyor see para 247 ante. Where a quantity surveyor became, with the knowledge of his employer and during the time of his employment, the managing director of the contractors engaged on the same contract, by continuing his employment the employer was held to have waived the surveyor's breach of duty and to be liable for his fees: *Thornton Hall & Partners v Wembley Electrical Appliances Ltd* [1947] 2 All ER 630, CA.

In the 19th century the building contractor either employed and paid for the quantity surveyor or paid the quantity surveyor out of money certified to him and paid by the employer: see *Young v Smith* (1879) 2 Hudson's BC (4th Edn) 70; affd (1880) 2 Hudson's BC (4th Edn) 75, CA; *Locke v Morter* (1885) 2 TLR 121; *North v Bassett* [1892] 1 QB 333. In the latter case the contractor did not enter into any contractual relationship with the quantity surveyor (*Young v Blake* (1887) 2 Hudson's BC (4th Edn) 110; *Priestley v Stone* (1888) 4 TLR 730, CA; see also *Scrivener v Pask* (1866) LR 1 CP 715) and the quantity surveyor owed the contractor no duty of care (see *Stevenson v Watson* (1879) 4 CPD 148, and *Ludbrook v Barrett* (1877) 46 LJQB 798). These arrangements would nowadays be exceptional other than in certain types of project or construction management contracts.

² *Money Penny v Hartland* (1826) 2 C & P 378.

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312. Liability of quantity surveyor.

The quantity surveyor is usually employed to prepare bills of quantities¹, to measure and value the works for the purposes of payment², and to perform other duties. His authority may be defined by the contract³. He must prepare the bills of quantities and make his measurements and valuations skilfully, though he will not be liable if he makes a few arithmetical errors in carrying out a large number of intricate calculations⁴.

The quantity surveyor is not liable to the contractor for any representations contained in the bills of quantities, unless such representations are made fraudulently⁵, but he may be liable in tort if he is negligent⁶.

If the quantity surveyor fraudulently either for his own purposes, or in collusion with the employer, takes out the quantities short, he is liable to the contractor in the first case alone, and in the second jointly with the employer⁷.

If one or more persons intending to tender for a contract employ a quantity surveyor to estimate the quantities, the quantity surveyor is liable to him or them, on ordinary principles, if he is negligent.

In the absence of a special relationship it is not thought that a quantity surveyor retained by a prospective employer owes a duty of care to point out to a tenderer mistakes in his tender⁸.

If the contractor requires a quantity surveyor to measure variations he will be liable for his fees⁹, but usually the architect will instruct the quantity surveyor to do this.

Quantity surveyors in recent times have begun to take on responsibilities for contractual supervision and administration more traditionally performed by architects or engineers. They are obliged to perform these functions also with reasonable skill and care¹⁰.

1 As to bills of quantities see para 11 ante.

2 See eg *Sutcliffe v Chippendale and Edmondson (a firm)* (1971) 18 BLR 149 at 165 per Judge Stabb QC.

3 See eg *John Laing Construction Ltd v County and District Properties Ltd* (1982) 23 BLR 1.

4 *London School Board v Northcroft* (1889) 2 Hudson's BC (4th Edn) 147.

5 *Priestley v Stone* (1888) 4 TLR 730, CA.

6 *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465, [1963] 2 All ER 575, HL; *Henderson v Merrett Syndicates* [1995] 2 AC 145, HL; *South Nation River Conservation Authority v Auto Concrete Curb Ltd* (1993) 11 Const LJ 155, Can SC; *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 66 BLR 56, Can SC; *J Jarvis & Sons Ltd v Castle Wharf Developments Ltd* [2001] NPC 15, CA. See generally para 166 ante; and NEGLIGENCE vol 78 (2010) PARAS 14, 23.

7 *Priestley v Stone* (1888) 4 TLR 730, CA. See also para 266 ante.

8 See *Dutton v Louth Corpn* (1955) 116 Estates Gazette 128, CA.

9 *Beattie v Gilroy* (1882) 10 R 226, Ct of Sess; *Plimsaul v Lord Kilmorey* (1884) 1 TLR 48.

10 *George Fischer Holding Ltd v Multi Design Consultants Ltd* (1998) 61 ConLR 85.

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313. Remuneration of quantity surveyor and printing charges.

The amount which a quantity surveyor is entitled to claim, in the absence of any express contract fixing his remuneration, is a reasonable reward for the work and labour expended by him. The fact that a licence may not be obtainable to enable all the work to be carried out should not affect the surveyor's remuneration¹.

Quantity surveyors usually charge a percentage on the contract price, but there is no custom binding on the persons employing them to pay on such a basis².

If the quantity surveyor charges for printing his quantities, he may retain any cash discount³ but not a trade discount.

1 *Debney v Enoch & Co (General Merchants) Ltd* (1953) 162 Estates Gazette 204. As to licences see paras 104-105 ante.

2 *Gwyther v Gaze* (1875) 2 Hudson's BC (4th Edn) 34. See also paras 277-278 ante.

3 *London School Board v Northcroft* (1889) 2 Hudson's BC (4th Edn) 147.

